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and

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Title 5. Appeal and Error

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Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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TITLE 4

ANIMALS

Chap.

1. General Provisions, 4-1-1 through 4-1-6.
2. Marks and Brands, 4-2-1 through 4-2-5.
3. Livestock Running at Large or Straying, 4-3-1 through 4-3-12.
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CHAPTER 1

GENERAL PROVISIONS

Sec.

- 4-1-6. Obstruction, interference, or hindrance of duties.

4-1-6. Obstruction, interference, or hindrance of duties.

It shall be unlawful for any person to obstruct, interfere, or hinder the Commissioner, his or her designated agents and employees, an animal control officer, or a dog control officer in the lawful discharge of his or her official duties pursuant to this title. Any person convicted of a violation of this Code section shall be punished as provided in subsection (b) of Code Section 16-10-24. (Code 1981, § 4-1-6, enacted by Ga. L. 2000, p. 754, § 2.)

Effective date. — This Code section became effective May 1, 2000.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

Law reviews. — For note on 2000 amendment of O.C.G.A. § 4-1-6, see 17 Ga. St. U.L. Rev. 12 (2000).

CHAPTER 2

MARKS AND BRANDS

Sec.
4-2-1. Mark, brand, or tattoo registration — certificates.

4-2-1. Mark, brand, or tattoo registration — certificates.

(a) Any person owning any livestock and desiring to register a mark, brand, or tattoo shall apply to the Commissioner for a certificate of mark, brand, or tattoo registration. Application for a certificate shall be made on forms provided by the department. Applications shall contain or be accompanied by such information as may be required by rule or regulation. In issuing certificates, the Commissioner shall not issue certificates to more than one person for the same or substantially identical marks, brands, or tattoos. There shall be no charge or fee for registration.

(b) Prior to July 1 of 1974 and on or before the same date every fifth year thereafter, the Commissioner shall purge from his lists of registrations the registrations of all marks, brands, or tattoos which the person to whom they are registered does not desire to retain as a registered mark, brand, or tattoo. Prior to removing a mark, brand, or tattoo from registration, the Commissioner shall, by registered or certified mail or statutory overnight delivery, notify the person to whom the mark, brand, or tattoo is registered that the registration will be canceled unless the Commissioner is notified within a period of three months from the date of mailing that such person desires to continue the registration of his mark, brand, or tattoo. If the Commissioner does not receive a reply within three months, he may cancel the registration of such mark, brand, or tattoo and may then reassign such mark, brand, or tattoo to any person seeking to register it, under such rules and regulations as may be prescribed by the Commissioner.

(c) It shall be the duty of the Commissioner to transmit a copy of any certificate of mark, brand, or tattoo registration to the judge of the probate court of the county of residence of the person to whom the certificate is issued or to the judge of the probate court of the county in

which the animals to be marked, branded, or tattooed are located if the owner thereof is not a resident of this state. The judge of the probate court may record the certificate in a book kept by him for that purpose.

(d) No provision of this chapter shall affect or impair the validity of any mark, brand, or tattoo registered or recorded in the office of the Commissioner prior to April 1, 1974. (Ga. L. 1953, Nov.-Dec. Sess., p. 175, § 2; Code 1933, § 62-102, enacted by Ga. L. 1974, p. 1003, § 1; Ga. L. 1995, p. 244, § 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 458, § 2/SB 364.)

The 2000 amendment, effective July 1, 2000, substituted “certified mail or statutory overnight delivery” for “certified mail” in the second sentence of subsection (b).

The 2008 amendment, effective May 12, 2008, deleted “, including any ratite,”

following “any livestock” in the first sentence of subsection (a).

Editor’s notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

CHAPTER 3

LIVESTOCK RUNNING AT LARGE OR STRAYING

Sec.
4-3-2. Definitions.

4-3-1. Legislative intent.

JUDICIAL DECISIONS

Preemption of local laws. — This Code section specifically finds and declares a necessity for a uniform state-wide livestock law embracing all public roads in the state, therefore, it expressly preempts

local laws on the subject by declaring the need for uniformity. *Hortman v. Guy*, 242 Ga. App. 174, 529 S.E.2d 182 (2000).

Cited in *Cotton v. State*, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 33.

4-3-2. Definitions.

As used in this chapter, the term:

(1) “Livestock” means all animals of the equine, bovine, or swine class, including goats, sheep, mules, horses, hogs, cattle, and other grazing animals.

(2) “Owner” means any person, association, firm, or corporation, natural or artificial, owning, having custody of, or in charge of livestock.

(3) “Public roads” means any street, road, highway, or way, including the full width of the right of way, which is open to the use of the public for vehicular travel.

(4) “Running at large” or “straying” means any livestock which is not under manual control of a person and which is on any public roads of this state or on any property not belonging to the owner of the livestock, unless by permission of the owner of such property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 2; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 2; Ga. L. 1995, p. 244, § 4; Ga. L. 2008, p. 458, § 3/SB 364.)

The 2008 amendment, effective May 12, 2008, deleted “, and all ratites, including, but not limited to, ostriches, emus,

and rheas” following “grazing animals” from the end of paragraph (1).

JUDICIAL DECISIONS

“Owner” construed.

Owner of a pasture who allowed her son to keep his horse in the pasture was not an “owner” of the horse as that term is

defined in this Code section. *Supchak v. Pruitt*, 232 Ga. App. 680, 503 S.E.2d 581 (1998).

4-3-3. Permitting livestock to run at large or stray.

JUDICIAL DECISIONS

O.C.G.A. § 4-3-3 is not a penal statute. — Appellate court held that O.C.G.A. § 4-3-3 was not a penal statute and it reversed the trial court’s judgment convicting defendant and defendant’s spouse of violating that statute. *Cotton v. State*, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

Owner of a pasture who allowed her son to keep his horse in the pasture was not an “owner” of the horse as that term is defined in § 4-3-2(2) and, therefore, under no obligation to prevent the horse from escaping. *Supchak v. Pruitt*, 232 Ga. App. 680, 503 S.E.2d 581 (1998).

Evidence of ownership required. — Grant of summary judgment to defendant on plaintiff’s claim for damages after his car hit a cow was proper because plaintiff failed to show that defendant owned the cow. *Taylor v. Thompkins*, 242 Ga. App. 789, 531 S.E.2d 360 (2000).

No evidence of owners’ negligence. — There was no evidence of a violation of

O.C.G.A. § 4-3-3, and summary judgment for owners was proper in a driver’s claim arising out of an accident in which the driver struck a cow because, inter alia, the evidence showed that the fencing surrounding the pasture where the cows were kept was in good repair and the gates were closed at the time of the driver’s accident; evidence was presented that the fencing was sufficient to confine the cattle, that the owners monitored the fences regularly, and that, after leaving the scene of the accident, one of the owners confirmed that all of the gates were closed and that the fences remained in good condition. The driver did not present any admissible evidence to challenge these claims and accordingly there was no evidence of negligence committed by the owners, but only impermissible speculation. *West v. West*, 299 Ga. App. 643, 683 S.E.2d 153 (2009).

Cited in *Johns v. Marlow*, 252 Ga. App. 79, 555 S.E.2d 756 (2001).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 68.

4-3-4. Impoundment of livestock running at large or straying.

Law reviews. — For annual survey on local government law, see 61 Mercer L. Rev. 255 (2009).

JUDICIAL DECISIONS

Official immunity for death of animal during impoundment attempt. — Trial court did not err in finding that a sheriff's deputy was entitled to official immunity after killing an owner's bull while attempting to impound the bull because the deputy's actions were discretionary. To control a potentially dangerous animal pursuant to O.C.G.A. § 4-3-4(a), the deputy was required to make decisions concerning the safety of the deputy

and others as circumstances—including the behavior of the animal—changed; under such changing circumstances, the deputy was required to exercise considerable deliberation and judgment, which rendered the deputy's actions discretionary. *Todd v. Brooks*, 292 Ga. App. 329, 665 S.E.2d 11 (2008), cert. denied, No. S08C1859, 2008 Ga. LEXIS 924 (Ga. 2008).

4-3-12. Permitting livestock to run at large or stray; releasing impounded livestock; penalty.

JUDICIAL DECISIONS

Relationship to other statutes. — Appellate court held that O.C.G.A. § 4-3-3 was not a penal statute and it reversed the trial court's judgment con-

victing defendant and defendant's spouse who were charged under § 4-3-3 instead of O.C.G.A. § 4-3-12. *Cotton v. State*, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

CHAPTER 4

PREVENTION AND CONTROL OF DISEASE IN LIVESTOCK

Article 1		Sec.	
Control of Infectious or Contagious Diseases in Livestock		4-4-2.1.	Fees for services rendered to A.P.H.I.S. programs.
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GENERAL PROVISIONS		4-4-6.	Penalty for introducing foreign animal disease; notice and reporting required for certain diseases; exception for bona fide research activities.
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4-4-1.1.			"Livestock" defined.

PART 4

PREVENTING SPREAD OF LIVESTOCK DISEASES

- 4-4-60. Extermination of parasites and development of livestock industry under supervision and control of Commissioner; employment of inspectors and veterinarians; public report.
- 4-4-69. Regulation of manufacture and use of disease vectors.

PART 5

LIVE POULTRY DEALERS, BROKERS, AND
MARKET OPERATORS

- 4-4-80. Definitions.
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Sec.

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Article 3

Equine Diseases

Article 5

Deer Farming

- 4-4-170. Purpose.
- 4-4-171. Definitions.
- 4-4-172. Deer-farming license; records; facilities.
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- 4-4-180. Release.
- 4-4-181. Penalty.

ARTICLE 1

CONTROL OF INFECTIOUS OR CONTAGIOUS DISEASES IN
LIVESTOCK

PART 1

GENERAL PROVISIONS

4-4-1.1. "Livestock" defined.

As used in this chapter, the term:

(1) "Livestock" means cattle, swine, equines, poultry, sheep, goats, nontraditional livestock, and ruminants.

(2) "Nontraditional livestock" means the species of Artiodactyla (even-toed ungulates) listed as bison, water buffalo, farmed deer, llamas, and alpacas that are held and possessed legally and in a manner which is not in conflict with the provisions of Chapter 5 of Title 27 dealing with wild animals. (Code 1981, § 4-4-1.1, enacted by Ga. L. 1986, p. 425, § 1; Ga. L. 1995, p. 244, § 5; Ga. L. 1997, p. 1395, § 1; Ga. L. 2008, p. 458, § 4/SB 364.)

The 1997 amendment, effective July 1, 1997, designated the paragraphs; added a colon following "term" in the undesignated paragraph; in paragraph

(1), substituted "Livestock" for "livestock" and inserted ", nontraditional livestock"; and added paragraph (2).

The 2008 amendment, effective May

12, 2008, deleted “ratites,” following “goats,” in paragraph (1).

4-4-2.1. Fees for services rendered to A.P.H.I.S. programs.

The Commissioner is authorized by rule or regulation to establish, impose, and provide for the collection of reasonable fees for services rendered by the department or its employees or agents in connection with federal programs administered by the United States Department of Agriculture, Animal and Plant Health Inspection Service pursuant to 5 U.S.C. Section 5542; 7 U.S.C. Section 1622; 19 U.S.C. Section 1306; 21 U.S.C. Sections 102 through 105, 111, 114, 114a, 134a, 134c, 134d, 134f, 136, and 136a; or 7 C.F.R. 2.22, 2.80, and 371.2(d) (1-1-99 Edition); provided, however, no fees shall be imposed or collected under this Code section for any services rendered for primates or wild animals. The fees so established shall be sufficient in amount to reimburse the state for the cost incurred by the department in providing and administering such services. (Code 1981, § 4-4-2.1, enacted by Ga. L. 2000, p. 878, § 1.)

Effective date. — This Code section became effective July 1, 2000.

4-4-5.

Reserved.

Editor’s notes. — Ga. L. 2008, p. 575, § 1, effective July 1, 2008, redesignated former Code Section 4-4-5 as present Code Section 2-2-13.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2008, this Code section was reserved.

4-4-6. Penalty for introducing foreign animal disease; notice and reporting required for certain diseases; exception for bona fide research activities.

(a) Any person who knowingly introduces into this state any foreign animal disease or any animal disease, syndrome, chemical, poison, or toxin that may pose a substantial threat of harm to the animal industries in this state shall be guilty of a misdemeanor of a high and aggravated nature.

(b)(1) Any person who makes a clinical diagnosis or laboratory confirmation of or who reasonably suspects the presence or occurrence of any of the following diseases, syndromes, or conditions in animals shall report the same immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge:

- (A) African Horse Sickness;
- (B) African Swine Fever;
- (C) Avian Influenza;
- (D) Classical Swine Fever (Hog Cholera);
- (E) Contagious Bovine Pleuropneumonia (*Mycoplasma mycoides mycoides*);
- (F) Contagious Ecthyma (Soremouth);
- (G) Foot & Mouth Disease (FMD, any type);
- (H) Heartwater (*Cowdria ruminantium*);
- (I) Lumpy Skin Disease;
- (J) Newcastle Disease (Exotic);
- (K) Nipah Virus;
- (L) Peste des Petits Ruminants;
- (M) Plague (*Yersinia pestis*);
- (N) Rift Valley Fever;
- (O) Rinderpest;
- (P) Screwworm (*Cochliomyia hominivorax*, *C. bezziana*);
- (Q) Sheep Pox and Goat Pox;
- (R) Swine Vesicular Disease;
- (S) Vesicular or Ulcerative Conditions;
- (T) Vesicular Exanthema; or
- (U) Vesicular Stomatitis (VS, any type).

(2) Any person who reasonably suspects the presence or occurrence of any vesicular diseases, mucosal diseases, or abortion storms of unknown etiology in livestock; undiagnosed bovine central nervous system conditions; unusual number of acute deaths in livestock; unusual myiasis or acarasis (flies, mites, ticks, etc.) in animals; or any apparently highly infectious or contagious animal condition of unknown etiology shall report the same immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge.

(3) Any person who makes a laboratory confirmation of any of the following diseases, syndromes, or conditions in animals shall report the same within 24 hours or by the close of the next business day,

whichever last occurs, to the state veterinarian or the United States Department of Agriculture area veterinarian in charge:

- (A) Akabane Virus Disease;
- (B) Anthrax (*Bacillus anthracis*);
- (C) Aujeszky's Disease (Pseudorabies);
- (D) Avian Chlamydiosis (Psittacosis and Ornithosis, *Chlamydia psittaci*);
- (E) Babesiosis (in livestock, any species);
- (F) Bluetongue;
- (G) Borna Disease;
- (H) Bovine Spongiform Encephalopathy;
- (I) Brucellosis (*Brucella. abortus*, *B. ovis*, *B. suis* *B. mellitensis*);
- (J) Camel Pox Virus;
- (K) Caseous Lymphadenitis (*Corynebacterium pseudotuberculosis*);
- (L) Chronic Wasting Disease;
- (M) *Clostridium perfringens* Epsilon Toxin;
- (N) Coccidioidomycosis (*Coccidioides immitis*);
- (O) Contagious Agalactia (*Mycoplasma agalactiae*, *M. capricolum capricolum*, *M. putrefaciens*, *M. mycoides mycoides*, *M. mycoides mycoides* LC);
- (P) Contagious Caprine Pleuropneumonia (*Mycoplasma capricolum capripneumoniae*);
- (Q) Contagious Equine Metritis (*Taylorella equigenitalis*);
- (R) Dourine (*Trypanosoma equiperdum*);
- (S) Enterovirus Encephalomyelitis (porcine);
- (T) Ephemeral Fever;
- (U) Epizootic Lymphangitis (*Histoplasma farciminosum*);
- (V) Equine Encephalomyelitis (Eastern, Western, Venezuelan, West Nile Virus);
- (W) Equine Infectious Anemia (EIA);
- (X) Equine Morbillivirus (Hendra virus);

- (Y) Equine Piroplasmosis (Babesiosis, *Babesia (Piroplasma) equi*, *B. caballi*);
- (Z) Equine Rhinopneumonitis (Type 1 and 4);
- (AA) Equine Viral Arteritis;
- (BB) Feline Spongiform Encephalopathy;
- (CC) Glanders (*Burkholderia [Pseudomonas] mallei*);
- (DD) Hemorrhagic Septicemia (*Pasteurella multocida*);
- (EE) Japanese Encephalitis Virus;
- (FF) Ibaraki;
- (GG) Infectious Laryngotracheitis (other than vaccine induced);
- (HH) Infectious Petechial Fever (*Ehrlichia ondiri*);
- (II) Louping Ill (Ovine encephalomyelitis);
- (JJ) Maedi-Visna/Ovine Progressive Pneumonia;
- (KK) Malignant Catarrhal Fever (Bovine Malignant Catarrh (AHV-1, OHV-2);
- (LL) Mange (in livestock) (*Sarcoptes scabiei* var *bovis* and *ovis*, *Psoroptes ovis*, *Chorioptes bovis*, *Psorergates bos* and *ovis*);
- (MM) Menangle virus;
- (NN) Melioidosis (*Burkholderia [Pseudomonas] pseudomallei*);
- (OO) Nairobi Sheep Disease;
- (PP) Paratuberculosis (*Mycobacterium avium paratuberculosis*);
- (QQ) Perkinsosis (*Perkinsus marinus* and *P. olseni*);
- (RR) Pullorum Disease (*Salmonella pullorum*);
- (SS) Q Fever (*Coxiella burnetti*);
- (TT) Rabbit Hemorrhagic Disease (Calicivirus disease);
- (UU) Rabies;
- (VV) Ricin Toxicosis (toxin from *Ricinus communis*);
- (WW) Salmonellosis caused by *Salmonella enteritidis*;
- (XX) Salmonellosis in equine (*Salmonella typhimurium*, *S. agona*, *S. anatum*, etc.);
- (YY) Scrapie;
- (ZZ) Shigatoxin;

- (AAA) Staphylococcal Enterotoxins;
- (BBB) Sweating Sickness;
- (CCC) Theileriosis (*Theileria annulata*, *T. parva*);
- (DDD) Transmissible Mink Encephalopathy;
- (EEE) Transmissible Spongiform Encephalopathies (all types);
- (FFF) Trypanosomiasis (*Trypanosoma congolense*, *T. vivax*, *T. brucei brucei*, *T. evansi*);
- (GGG) Tuberculosis (*Mycobacterium. bovis*, *M. tuberculosis*);
- (HHH) Tularemia (*Francisella tularensis*);
- (III) Ulcerative Lymphangitis (*Corynebacterium pseudotuberculosis*); or
- (JJJ) Wesselsbron Disease.

(4) Any person who makes a laboratory confirmation of any unusual presentation, unexplained increase in number of cases, or unusual trend of Botulism (*Clostridium botulinum* toxin), aflatoxin, or T-2 toxin in animals which such person reasonably suspects may be caused by bioterrorism as defined by Code Section 31-12-1.1 or epidemic or pandemic presentation and may pose a substantial threat of harm to the animal industries in this state shall report the same immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge.

(5) Any person, including without limitation any veterinarian or veterinary diagnostic laboratory or practice personnel, person associated with any livestock farm, ranch, sales establishment, transportation, or slaughter facility, as well as any person associated with a facility licensed under Chapter 10 of this title, the "Bird Dealers Licensing Act," or under Article 1 of Chapter 11 of this title, the "Animal Protection Act," who shall fail to report any disease, syndrome, or condition specified in this subsection as required by this subsection shall be guilty of a misdemeanor.

(c) The Commissioner is authorized to declare certain other animal diseases and syndromes to be diseases requiring notice and to require the reporting thereof to the department in a manner and at such times as may be prescribed by the Commissioner. The department shall require that such data be supplied as is deemed necessary and appropriate for the prevention and control of certain diseases and syndromes as are determined by the Commissioner.

(d) Any person who reasonably suspects the intentional use of any chemical or nuclear agent, microorganism, virus, infectious substance,

or any component thereof, whether naturally occurring or bioengineered, to cause death, illness, disease, or other biological malfunction in an animal shall report such suspicion immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge.

(e) All such reports and data submitted to the state veterinarian or the department pursuant to this Code section shall be deemed confidential and shall not be open to inspection by the public; provided, however, that the Commissioner may release such reports and data in statistical form, for valid research purposes, and for other purposes as deemed appropriate by the Commissioner.

(f) Any person, including, but not limited to, any veterinarian or veterinary diagnostic laboratory or practice personnel, person associated with any livestock farm, ranch, sales establishment, transportation, or slaughter facility, as well as any person associated with a facility licensed under Chapter 10 of this title, the "Bird Dealers Licensing Act," or under Article 1 of Chapter 11 of this title, the "Animal Protection Act," submitting reports or data in good faith in compliance with this Code section shall not be liable for any civil damages therefor.

(g) Any person who knowingly and willingly makes a false, fictitious, or fraudulent report in any matter within the jurisdiction of the state veterinarian or the department under this Code section shall be subject to the provisions of Code Section 16-10-20.

(h) This Code section shall not prohibit the conduct of any bona fide research activities by or on behalf of any accredited public or private college or university in this state, nor shall the reporting requirements of this Code section apply to persons performing such research activities. (Code 1981, § 4-4-6, enacted by Ga. L. 2002, p. 1386, § 1; Ga. L. 2003, p. 322, § 1.)

Effective date. — This Code section became effective May 16, 2002.

The 2003 amendment, effective July 1, 2003, rewrote this Code section.

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting. — Offense arising under O.C.G.A. § 4-4-6 does not require fin-

gerprinting. 2002 Op. Att'y Gen. No. 2002-7.

PART 4

PREVENTING SPREAD OF LIVESTOCK DISEASES

4-4-60. Extermination of parasites and development of livestock industry under supervision and control of Commissioner; employment of inspectors and veterinarians; public report.

The work of exterminating the cattle fever tick, screwworm, and other parasites and of developing the livestock industry in this state shall be under the supervision and control of the Commissioner, who is authorized to employ persons qualified to act as livestock inspectors and supervising veterinarians. The Commissioner shall publish in print or electronically a detailed statement annually of the expenditures and progress of this work for free public distribution. (Ga. L. 1912, p. 22, § 2; Code 1933, § 62-1012; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted “in print or electronically” in the last sentence.

4-4-69. Regulation of manufacture and use of disease vectors.

(a) As used in this Code section, the term “disease vector” means any agent or material which has the power to produce or spread disease in livestock.

(b) No experimental or research work, except at or under the direction of the College of Veterinary Medicine of the University of Georgia, the Georgia Poultry Improvement Association Laboratory, the College of Agricultural and Environmental Sciences of the University of Georgia, and the state agricultural experiment stations, shall be carried on in this state with any live virus or any other disease vector. No such virus or disease vector shall be manufactured or distributed in this state except under permit issued by the Commissioner and conditioned, as in his judgment necessary, to prevent the spread of such disease.

(c) This Code section shall not apply to the county health departments, the Department of Public Health, the United States Department of Health and Human Services, accredited medical and dental colleges and universities, approved hospitals, approved medical centers, or foundations engaged in medical research, diagnosis, or treatment of the diseases of man. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 18; Ga. L. 1995, p. 10, § 4; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

The 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in subsection (c).

The 2011 amendment, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community Health” in subsection (c).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011). For article, “Health: Department of Public Health,” see 28 Ga. St. U.L. Rev. 147 (2011).

PART 5

LIVE POULTRY DEALERS, BROKERS, AND MARKET OPERATORS

4-4-80. Definitions.

As used in this part, the term:

(1) “Dealer” or “broker” means any person, firm, or corporation engaged in the business of buying live poultry of any kind for resale or in selling live poultry of any kind bought for the purpose of resale. Every agent acting for or on behalf of any dealer, broker, or poultry market operator is a dealer or broker, provided that any farmer acquiring poultry solely for the purpose of rearing and feeding such poultry as a part of his or her farm operations is not a “dealer” or “broker.”

(2) “Person” means any person, firm, corporation, association, cooperative, or combination thereof.

(3) “Poultry” means domestic fowl including, but not limited to, water fowl such as geese and ducks; birds which are bred for meat and egg production, exhibition, or competition; game birds such as pheasants, partridge, quail, and grouse, as well as guinea fowl, pigeons, doves, peafowl; ratites; and all other avian species.

(4) “Poultry market operator” means any person engaged in the business of operating public auctions or sales of live poultry or of operating barns and yards for the containment of live poultry held for the purpose of auction or sale.

(5) “Sales establishment” means any yard, barn, or other premises where live poultry is offered for sale, auction, or exchange. (Code 1981, § 4-4-80, enacted by Ga. L. 1987, p. 525, § 1; Ga. L. 1995, p. 244, § 6; Ga. L. 2008, p. 458, § 5/SB 364.)

The 2008 amendment, effective May 12, 2008, in paragraph (3), inserted “ratites;” near the end, and deleted the former second sentence, which read:

“Such term shall not include ratites, which are considered to be livestock under the laws of this state.”

4-4-82. License requirement; records requirement; transportation equipment; disposal of dead poultry.

(a) No poultry market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. No poultry dealer or broker shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. There shall be a fee of \$35.00 per annum for such license. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

(b) The license of any licensed dealer, broker, or poultry market operator violating this part or any rule or regulation adopted by the Commissioner pursuant to this part shall be subject to revocation, cancellation, or suspension following a notice and hearing.

(c) No dealer, broker, or poultry market operator shall buy, store, or otherwise receive any poultry without first recording the name and address of the person or persons from whom the poultry is received, the number and type of such poultry, and the motor vehicle license tag number of the vehicle used by the person or persons to transport the poultry. The dealer, broker, or poultry market operator shall also keep records of the name and address of the person or persons buying such poultry. These records shall be maintained for two years. All records shall be subject to review by the Commissioner or a representative or employee of the department.

(d) Any dealer, broker, or poultry market operator who transports live poultry shall keep all cages, coops, trucks, and trailers clean and sanitary. All equipment used to transport live poultry shall be cleaned and disinfected after each use.

(e) Each dealer, broker, and poultry market operator shall properly dispose of dead poultry in accordance with Code Section 4-5-5. (Code 1981, § 4-4-82, enacted by Ga. L. 1987, p. 525, § 1; Ga. L. 2006, p. 216, § 1/HB 1213; Ga. L. 2010, p. 9, § 1-15/HB 1055.)

The 2006 amendment, effective April 19, 2006, in subsection (e), substituted "shall properly dispose of dead poultry in accordance with Code Section 4-5-5" for "shall have a poultry disposal pit or incinerator which has been approved by the Commissioner and shall use such pit or

incinerator to properly dispose of dead poultry".

The 2010 amendment, effective May 12, 2010, in subsection (a), substituted "\$35.00" for "\$25.00" in the third sentence and added the last sentence.

4-4-82.1. Limitation on slaughter of live poultry.

No dealer, broker, poultry market operator, or employee or contractor thereof or any person acquiring live poultry from any of them shall slaughter, other than for humane euthanasia or disease control, any

poultry that are on the premises of the dealer or broker or on the premises of a sales establishment. (Code 1981, § 4-4-82.1, enacted by Ga. L. 2006, p. 216, § 2/HB 1213.)

Effective date. — This Code section became effective April 19, 2006.

ARTICLE 3

EQUINE DISEASES

4-4-117. Veterinary services at equine sales; fees.

All licensed dealers, brokers, livestock market operators, or other individuals to whom this article is applicable shall furnish at all sales, including special sales, the services of a licensed, accredited veterinarian, who shall provide veterinary services necessary and consistent for animal health. Such veterinarian shall be paid reasonable fees for services rendered by the person on whose behalf such services are rendered. (Ga. L. 1969, p. 1021, § 8; Ga. L. 1996, p. 351, § 1.)

The 1996 amendment, effective July 1, 1996, substituted “who shall provide veterinary services necessary and consistent for animal health” for “who shall issue to the purchaser of any equines sold a certificate that the animal sold meets all existing health requirements and that the temperature of the animal is normal” in the first sentence, and rewrote the second sentence, which read “The cost of this service shall be paid by the seller and shall not exceed \$1.00 per head.”

4-4-118. Use of drugs, tranquilizers, and medications which result in misrepresentation in sale of equines.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Misrepresentations in Sale of Animal, 35 POF2d 607.

ARTICLE 5

DEER FARMING

Effective date. — This article became effective July 1, 1997.

4-4-170. Purpose.

The purpose of this article is to provide for the production of farmed deer as an agricultural operation and to provide for the importation, production, and control and eradication of disease in farmed deer. (Code 1981, § 4-4-170, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-171. Definitions.

As used in this article, the term:

(1) “Deer farming” means the agricultural operation of raising and production of farmed deer for the commercial production of food and fiber.

(2) “Farmed deer” means fallow deer (*Dama dama*), axis deer (*Axis axis*), sika deer (*Cervus nippon*), red deer and elk (*Cervus elaphus*), reindeer and caribou (*Rangifer tarandus*), and hybrids between these farmed deer species raised for the commercial sale of meat and other parts or for the sale of live animals. Those cervids which are indigenous to this state, including white-tailed deer, and those members of the order Artiodactyla which are considered to be inherently dangerous to human beings and are described in subparagraph (a)(1)(F) of Code Section 27-5-5 shall be classified as unacceptable species and shall not be included within the definition of farmed deer. Deer that may be under the authority of Title 50, Part 23, Subpart c of the Code of Federal Regulations, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U. ST. 108, TIAS 8249, must meet the requirements set forth in the federal Endangered Species Act of 1973, as amended, 16 U.S.C. Section 1531 et seq. (Code 1981, § 4-4-171, enacted by Ga. L. 1997, p. 1395, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, “Section” was inserted in the last sentence of paragraph (2).

4-4-172. Deer-farming license; records; facilities.

(a) No person shall possess, buy, import, or transport farmed deer or engage in or carry on the business of deer farming without first applying for and obtaining a deer-farming license from the Commissioner of Agriculture. A deer-farming license shall be valid from the date of issuance to March 31 of the following calendar year. A deer-farming license will not be issued by the Commissioner to any deer-farming operation which has not been inspected and approved by the Department of Natural Resources, provided that any facility expansion must be reapproved prior to renewal of a deer-farming license.

(b) The license of any deer farm operator violating this article or any rule or regulation adopted by the Commissioner pursuant to this article shall be subject to revocation, cancellation, or suspension following notice and hearing. A deer-farming license of any licensee whose facility does not meet the definition of an agricultural operation shall be revoked, and such license may be revoked if the licensee violates any provision of Title 27, relating to wild animals. Any farmed deer must be disposed of within 45 days of revocation of any deer-farming license.

(c) Deer farm operators shall maintain inventory records of their deer herds, including natural additions, purchased additions, sales, and deaths. Records shall be kept in accordance with specifications of the Commissioner and shall be subject to review by the Commissioner or a representative or employee of the department.

(d) Deer farm operators shall construct and maintain premises and facilities used in deer farming in accordance with rules established by the Commissioner and in accordance with subparagraph (A) of paragraph (1) of Code Section 27-5-6, provided that:

(1) The facility must be constructed of such material and of such strength as appropriate for the animals involved;

(2) Housing facilities shall be structurally sound and shall be maintained in good repair to protect and contain the animals;

(3) The facilities shall be designed in such manner, including the inclusion of barriers of sufficient dimensions and conformation, to safeguard both the animals and the public against injury or the transmission of diseases by direct contact; and

(4) Any portion of such facility within which farmed deer are maintained shall be surrounded by a fence with a minimum height of eight feet with the bottom six feet made of woven mesh and constructed of a design, strength, gauge, and mesh approved by the department, after consultation with the Department of Natural Resources, and which is sufficient to prevent escape of farmed deer and to prevent white-tailed deer from entering. Supplemental wire to attain a height of eight feet may be smooth, barbed, or woven wire of a gauge and mesh approved by the department with strands no more than six inches apart. All trees and other structures which pose a threat to the integrity of the fencing shall be removed unless fencing is constructed so as to prevent the breach of the fence from the fall of a tree or structure.

(e) It shall be the duty of the Department of Agriculture to inspect an applicant's facilities and to transmit a copy of any application for a deer-farming license to the Department of Natural Resources. The Department of Natural Resources shall inspect the applicant's facilities and shall report to the Department of Agriculture within 30 days of receipt of the application. It also shall be the duty of the Department of Agriculture to transmit a copy of any license issued pursuant to this article to the Department of Natural Resources. It also shall be the duty of the Department of Agriculture to notify the Department of Natural Resources of the revocation, nonrenewal, cancellation, or lapse of any license issued pursuant to this article. All such notifications shall be made in writing and shall be made as promptly as possible, but in no event shall such notification be given more than 72 hours after the event giving rise to the requirement of notice.

(f) For purposes other than agricultural operations, farmed deer species must be held under a wild animal license pursuant to Chapter 5 of Title 27. Anyone holding, possessing, importing, or transporting farmed deer without a deer-farming license or a wild animal license is in violation of Title 27. (Code 1981, § 4-4-172, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-173. Health and transportation requirements.

Health and transportation requirements for any Artiodactyla (even-toed ungulates) must meet the health requirements established by rule or regulation of the Georgia Department of Agriculture. Those animals specifically used for deer farming must meet the requirements of the Uniform Methods and Rules of the Code of Federal Regulations for Tuberculosis and Brucellosis in Cervidae. (Code 1981, § 4-4-173, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-174. Escaped deer or cervid.

Any farmed deer or cervid which escapes from a licensed deer farm shall be subject to the jurisdiction of the Department of Natural Resources and may be treated as an escaped wild animal which is subject to the provisions of Chapter 5 of Title 27, except that, while such animal is roaming freely outside the enclosure of any licensed deer farm, the owner of such farmed deer or cervid shall have 48 hours from the time the escape is detected to recapture such animal and return it to the licensed deer farm. As a condition for maintaining a deer-farming license, it shall be the duty of the owner or operator of a licensed deer farm to notify the Department of Natural Resources immediately upon discovery of the escape of a farmed deer. When such notice has been given, no legal hunter shall be held liable for killing or wounding an escaped deer. (Code 1981, § 4-4-174, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-175. Compliance with departments.

Deer farm operators shall allow the entry onto the deer farm of representatives of the Department of Agriculture, the Department of Natural Resources, or other departments or agencies having authority or duties involving farmed deer or wild animals to ensure compliance with applicable federal and state laws. (Code 1981, § 4-4-175, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-176. Application.

The provisions of this article shall not apply to any facility at which any animal which would otherwise qualify as a farmed deer is inten-

tionally commingled with any species which is classified as and subject to regulation as a wild animal under the provisions of Chapter 5 of Title 27. (Code 1981, § 4-4-176, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-177. Rules and regulations.

The Commissioner of Agriculture is authorized to promulgate rules and regulations as may be necessary to effectuate the purpose of this article. Such rules and regulations shall be promulgated after consultation with the Department of Natural Resources and shall be designed to ensure the health and safety of wildlife and prevent the spread of animal diseases between wildlife, wild animals, domestic animals, farmed deer, and people. It shall be the duty of the Commissioner, the Department of Agriculture, the Board of Natural Resources, the commissioner of natural resources, and the Department of Natural Resources to communicate and consult on matters of mutual concern so as to ensure the health and safety of farmed deer, wildlife, wild animals, domestic animals, and people and to prevent, control, and eradicate animal diseases within this state. (Code 1981, § 4-4-177, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-178. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner pursuant to this article. An injunction issued under this Code section shall not require a bond. (Code 1981, § 4-4-178, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-179. Administrative hearings; penalty.

(a) The Commissioner, in order to enforce this article or any orders, rules, or regulations promulgated pursuant to this article, may issue an administrative order imposing a penalty not to exceed \$1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person has violated any provision of this article or any quarantines, orders, rules, or regulations promulgated pursuant to this article.

(b) The initial hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases in

Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50. All penalties recovered by the Commissioner as provided for in this article shall be paid into the state treasury. The Commissioner may file in the superior court wherein the person under order resides or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business or in the county wherein the violation occurred a certified copy of a final order of the Commissioner unappealed from or of a final order of the department affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in an action duly heard and determined by said court. The penalty prescribed in this Code section shall be concurrent, alternative, or cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any quarantines, orders, rules, or regulations promulgated pursuant thereto. (Code 1981, § 4-4-179, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-180. Release.

It shall be unlawful for any person intentionally to release a farmed deer from captivity or to import, transport, sell, transfer, or possess a farmed deer in such a manner as to cause its release or escape from captivity. If a person imports, transports, sells, transfers, or possesses a farmed deer in such a manner as to pose a reasonable possibility that such farmed deer may be released accidentally or escape from captivity, the department may revoke the license of such person. (Code 1981, § 4-4-180, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-181. Penalty.

Any person violating the provisions of this article shall be guilty of a misdemeanor. (Code 1981, § 4-4-181, enacted by Ga. L. 1997, p. 1395, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — An offense covered by this Code section is not currently designated as an offense requiring fingerprinting. 1997 Op. Att’y Gen. No. 97-330.

CHAPTER 5

DISPOSAL OF DISEASED, DISABLED, OR DEAD ANIMALS

Sec.		Sec.	
4-5-2.	"Dead animals" defined.	4-5-7.	Disposal of dead animals and waste material; approval by Commissioner.
4-5-3.	Abandonment of dead animals; requirements as to disposal generally; disposal in wells, open pits, or surface waters or on private or public property; disposal in city or county landfill.	4-5-9.	Prohibition or restriction on transport of dead animals; permit issuance.
4-5-5.	Methods of disposal of dead animals.	4-5-10.	Promulgation of rules and regulations.

4-5-2. "Dead animals" defined.

As used in this chapter, the term "dead animals" means the carcasses, parts of carcasses, fetuses, embryos, effluent, or blood of livestock, including, without limitation, cattle, swine, sheep, goats, poultry, ratites, equine, and alternative livestock; pet animals associated with pet dealers, kennels, animal shelters, or bird dealers licensed by the Georgia Department of Agriculture; animals processed by commercial facilities which process animals for human consumption; and animals associated with wildlife exhibitions. (Ga. L. 1969, p. 1018, § 2; Ga. L. 1973, p. 569, § 1; Ga. L. 1995, p. 244, § 7; Ga. L. 2002, p. 1397, § 1.)

The 2002 amendment, effective July 1, 2002, inserted ", fetuses, embryos", deleted "farm" preceding "livestock", inserted ", without limitation, cattle, swine, sheep, goats," and substituted "equine, and alternative livestock; pet animals associated with pet dealers, kennels, animal shelters, or bird dealers licensed by the Georgia Department of Agriculture; animals processed by commercial facilities which process animals for human consumption; and animals associated with wildlife exhibitions" for "and equines" at the end.

4-5-3. Abandonment of dead animals; requirements as to disposal generally; disposal in wells, open pits, or surface waters or on private or public property; disposal in city or county landfill.

(a) It shall be unlawful for any person who owns or is caring for an animal which has died or has been killed to abandon the dead animal. Such person shall dispose of the dead animal as provided for in this chapter or in rules and regulations adopted pursuant to this chapter. Dead animals shall not be abandoned in wells, open pits, or surface waters of any kind on private or public land.

(b) No person shall dispose of a dead animal on the land of another without the permission of the owner of the land.

(c) Arrangements must be made with a city or county official in order to dispose of a dead animal in a city or county landfill. (Ga. L. 1969, p. 1018, § 3; Ga. L. 1973, p. 569, § 2; Ga. L. 2002, p. 1397, § 2.)

The 2002 amendment, effective July 1, 2002, in subsection (a), substituted “dead animal” for “animal, its parts, or blood” at the end of the first sentence and, in the last sentence, substituted “Dead animals shall not” for “Under no conditions may dead animals” and substituted “wells, open pits, or surface waters” for

“wells or open pits”; substituted “a dead animal” for “an animal, its parts, or blood by burial or burning” in subsection (b); and, in subsection (c), deleted “for proper burial or burning” following “Arrangements” and substituted “landfill” for “dump” at the end.

4-5-5. Methods of disposal of dead animals.

Methods which can be used for disposal of dead animals are burning, incineration, burial, rendering, or any method using appropriate disposal technology which has been approved by the Commissioner of Agriculture. Disposal of dead animals by any of the approved methods must be completed within 24 hours after death or discovery. Dead animals that are buried must be buried at least three feet below the ground level, have not less than three feet of earth over the carcass, and must not contaminate ground water or surface water. (Ga. L. 1969, p. 1018, § 5; Ga. L. 2000, p. 1297, § 1; Ga. L. 2002, p. 1397, § 3.)

The 2000 amendment, effective July 1, 2000, in the first sentence, inserted “, incineration” and substituted “rendering, or any method using appropriate disposal technology which has been approved by the Commissioner” for “or rendering”; and deleted the former third sentence which read: “Carcasses which are burned must be attended until the process is completed.”

The 2002 amendment, effective July 1, 2002, added “of Agriculture” at the end of the first sentence; in the second sen-

tence, substituted “dead animals” for “animal carcasses”, substituted “24 hours” for “12 hours”, and deleted “of the carcass” following “discovery”; in the third sentence, substituted “Dead animals that” for “Carcasses which”, substituted “ground level,” for “ground level and”, and added “, and must not contaminate ground water or surface water” at the end.

Law reviews. — For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 22 (2000).

4-5-6. Destruction of diseased and disabled animals which have been abandoned.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Justifiable Destruction of Animal, 37 POF2d 711.

4-5-7. Disposal of dead animals and waste material; approval by Commissioner.

(a) Public livestock sales markets, livestock slaughter establishments, poultry dealers, poultry sales establishments, pet dealers, kennels, bird dealers, animal shelters, and stables licensed by the Georgia Department of Agriculture shall have a written, approved method and place for the disposal of all dead animals and all accessory waste material involved in the handling of dead animals which die on or within the premises of such establishments.

(b) The Commissioner of Agriculture shall approve the methods and places for disposal of such dead animals and may establish procedures, methods, and permits for disposal of dead animals. (Ga. L. 1969, p. 1018, § 4; Ga. L. 2002, p. 1397, § 4.)

The 2002 amendment, effective July 1, 2002, designated the existing provisions as subsection (a); in subsection (a), substituted “markets, livestock” for “markets and livestock”, inserted “, poultry dealers, poultry sales establishments, pet dealers, kennels, bird dealers, animal shelters, and stables licensed by the Geor-

gia Department of Agriculture”, substituted “a written, approved” for “an approved”, substituted “dead animals” for “portions of any carcass, including blood, effluent,”, and substituted “dead animals” for “the carcasses of animals”; and added subsection (b).

4-5-9. Prohibition or restriction on transport of dead animals; permit issuance.

The Commissioner of Agriculture may prohibit or restrict, at his or her discretion, and issue permits for the hauling or transportation of dead animals or types of dead animals and order the destruction thereof in accordance with this chapter. (Ga. L. 1969, p. 1018, § 6; Ga. L. 1973, p. 569, § 3; Ga. L. 2002, p. 1397, § 5.)

The 2002 amendment, effective July 1, 2002, inserted “of Agriculture”, inserted “or restrict”, inserted “or her”, inserted “and issue permits for”, and substituted

“dead animals or types of dead animals” for “the body, effluent, or parts of any dead animals”.

4-5-10. Promulgation of rules and regulations.

The Commissioner of Agriculture is authorized to promulgate rules and regulations to implement and accomplish the purposes of this chapter. (Ga. L. 1969, p. 1018, § 8; Ga. L. 2002, p. 1397, § 6.)

The 2002 amendment, effective July 1, 2002, inserted “of Agriculture” near the beginning.

CHAPTER 6

LIVESTOCK DEALERS AND AUCTIONS

Article 1		Sec.	
Livestock Dealers			purchases; proof of compliance with bonding requirements.
Sec.			
4-6-1.	Definitions.	4-6-52.	Special sales.
4-6-3.	Licenses — Required; fee; term; bonding.		
Article 3			
Livestock Auctions			
4-6-49.	Annual reports of sales and		

ARTICLE 1
LIVESTOCK DEALERS

4-6-1. Definitions.

- As used in this chapter, the term:
- (1) “Bond” means a written instrument issued or executed by a bonding, surety, or insurance company licensed to do business in this state, guaranteeing that the person bonded shall faithfully fulfill the terms of the contract of purchases and guarantee the payment of the purchase price of all livestock purchased by him, made payable to the Commissioner for the benefit of persons sustaining loss resulting from the nonpayment of the purchase price or the failure to fulfill the terms of the contract of purchase.
- (2) “Cash” includes only currency, cashier’s checks, and money orders.
- (3) “Dealer” is synonymous with the term “broker” and means any person, firm, or corporation, including a packer, engaged in the business of buying livestock of any kind for resale or in selling livestock of any kind bought for the purpose of resale or in buying livestock of any kind for slaughter. Every agent acting for or on behalf of any dealer, broker, or livestock market operator is a dealer or broker.
- (A) Farmers acquiring livestock solely for the purpose of grazing and feeding as a part of their farm operations are not encompassed by the definition of “dealer” or “broker”; and
- (B) Packers whose total annual purchases of livestock are less than \$50,000.00 who buy only from licensed dealers and licensed sales establishments are not included in the definition of “dealer” or “broker.”

(4) “Livestock” means cattle, swine, equines, sheep, and goats of all kinds and species.

(5) “Livestock market operator” means any person, firm, or corporation engaged in the business of operating a sales establishment, public auctions or sales of livestock, or barns and yards for the containment of livestock held for the purpose of auction or sale.

(6) “Person” means any person, firm, corporation, association, cooperative, or combination thereof.

(7) “Sales establishment” means any yard, barn, or other premises where livestock is sold at auction. (Ga. L. 1952, p. 184, § 1; Ga. L. 1983, p. 1161, § 1; Ga. L. 1995, p. 244, § 8; Ga. L. 1996, p. 351, § 1; Ga. L. 2008, p. 458, § 6/SB 364.)

The 1996 amendment, effective July 1, 1996, inserted “equines,” in paragraph (4).

The 2008 amendment, effective May 12, 2008, deleted “ratites,” following “sheep,” in paragraph (4).

4-6-3. Licenses — Required; fee; term; bonding.

No livestock market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. No livestock dealer or broker who buys or sells through a livestock market operator or directly from producers shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. There shall be no fee for such license. No such license shall be issued to any person unless the applicant therefor furnishes to the Commissioner the required bond. The bonds shall be executed by a surety corporation authorized to transact business in this state and approved by the Commissioner. Any and all bond applications shall be accompanied by a certificate of “good standing” issued by the Commissioner of Insurance. If any company issuing a bond shall be removed from doing business in this state, it shall be the duty of the Commissioner of Insurance to notify the Commissioner of Agriculture within 30 days. Such bonds shall be upon forms prescribed by the Commissioner and shall be conditioned to secure the faithful performance of such person’s obligations as a livestock market operator, livestock dealer, or livestock broker under this article and the rules and regulations prescribed under this article. Whenever the Commissioner shall determine that a previously approved bond has for any cause become insufficient, the Commissioner may require an additional bond or bonds to be given, conforming with the requirements of this Code section. Unless the additional bond or bonds are given within the time fixed by written demand therefor, or if the bond of a dealer, broker, or livestock market operator is canceled, then the license of such person shall immediately be revoked by operation of law without notice or

hearing. (Ga. L. 1952, p. 184, § 3; Ga. L. 1958, p. 386, § 1; Ga. L. 1982, p. 3, § 4; Ga. L. 1982, p. 1804, § 1; Ga. L. 1983, p. 1161, § 1; Ga. L. 1999, p. 800, § 5.)

The 1999 amendment, effective July 1, 1999, added the fifth through ninth sentences and substituted “Unless the additional bond or bonds are given within the time fixed by written demand therefor, or if” for “If” in the last sentence.

ARTICLE 3

LIVESTOCK AUCTIONS

4-6-49. Annual reports of sales and purchases; proof of compliance with bonding requirements.

It shall be the duty of each sales establishment to report to the Commissioner not later than the last day of the third month following the close of the establishment’s fiscal year the total sales of such establishment for the preceding fiscal year. It shall be the duty of each dealer to report to the Commissioner not later than the last day of the third month following the close of the dealer’s fiscal year the total purchases of such dealer for the preceding fiscal year. The Commissioner may prescribe the form of such reports. At the time the report is made, each sales establishment and dealer shall submit proof to the Commissioner of compliance with the bonding requirements of this chapter. The failure to submit the information required in this Code section shall be sufficient grounds to revoke the license of any such sales establishment or dealer. (Ga. L. 1959, p. 296, § 4; Ga. L. 1983, p. 1161, § 1; Ga. L. 1999, p. 800, § 6.)

The 1999 amendment, effective July 1, 1999, substituted “fiscal” for “calendar” in two places, substituted “the last day of the third month following the close of the establishment’s fiscal year” for “March 31 of each year” in the first sentence, and substituted “the last day of the third month following the close of the dealer’s fiscal year” for “March 31 of each year” in the second sentence.

4-6-52. Special sales.

(a) As used in this Code section, “special sale” means any livestock sale, except a regular sale at an establishment and any sale by a farmer of livestock owned by the farmer, with payment made directly to the farmer.

(b) The Commissioner is authorized to prescribe rules and regulations for the operation of special sales. No person shall hold a special sale without obtaining a permit therefor from the Commissioner or his duly authorized representative, which shall be granted without charge upon submission of proof satisfactory to the Commissioner that the person applying for the permit is bonded in an amount equal to

one-fourth of the anticipated proceeds of the sale; provided, however, such bond shall be not less than \$10,000.00 and not more than \$150,000.00 in amount.

(c) Associations holding sales of animals consigned by members of the association only shall not be required to procure a bond if the directors of the association accept full responsibility for financial obligations of sale and release the Commissioner, in writing, from any responsibility.

(c.1) Georgia 4-H clubs and Georgia Future Farmers of America chapters shall not be required to procure a bond.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1959, p. 296, § 6; Ga. L. 1978, p. 1467, § 1; Ga. L. 1982, p. 1804, § 5; Ga. L. 1983, p. 1161, § 1; Ga. L. 1998, p. 218, § 1.)

The 1998 amendment, effective July 1, 1998, added subsection (c.1).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Misrepresentation in Sale of Animal, 35 POF2d 607.

CHAPTER 8

DOGS

Article 1		Sec.	
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4-8-30.	Confiscation by dog control officer; payment of costs for recovery; euthanasia.	4-8-32.	Application and compliance.
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			Article 3
			Vicious Dogs
			4-8-40 through 4-8-45. [Repealed.]

ARTICLE 1

GENERAL PROVISIONS

4-8-1. Minimum standards for control of dogs.

It is the intention of this chapter to establish as state law minimum standards for the control and regulation of dogs and to establish state crimes for violations of such minimum standards. However, this chapter shall not prohibit local governments from adopting and enforcing ordinances or resolutions which provide for more restrictive control and regulation of dogs than the minimum standards provided for in this chapter. (Code 1981, § 4-8-1, enacted by Ga. L. 2012, p. 1290, § 1/HB 685.)

Effective date. — This Code section became effective July 1, 2012. See the editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1290, § 1/HB 685, effective July 1, 2012, redesignated former Code Section 4-8-1 as present Code Section 4-8-1.1.

Ga. L. 2012, p. 1290, § 6/HB 685, not

codified by the General Assembly, provides, in part, that this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

4-8-1.1. Abandonment of dead dogs — Upon private property.

No person shall intentionally abandon a dead dog on any private property belonging to another unless the person so doing shall have first obtained permission from the owner of the property on which the dog is being left and the provisions of Code Section 4-5-3 are complied with in full. (Ga. L. 1969, p. 831, § 1; Code 1981, § 4-8-1; Code 1981, § 4-8-1.1, redesignated by Ga. L. 2012, p. 1290, § 1/HB 685.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 4-8-1 as present Code Section 4-8-1.1.

Editor's notes. — Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that this Code

section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

4-8-4. Liability of owner or custodian for damages done to livestock, poultry, or pet animal by dog.

(a) The owner or, if no owner can be found, the custodian exercising care and control over any dog which while off the owner's or custodian's property causes injury, death, or damage directly or indirectly to any livestock, poultry, or pet animal shall be civilly liable to the owner of the livestock, poultry, or pet animal for injury, death, or damage caused by the dog. The owner or, if no owner can be found, the custodian exercising care and control over any dog shall be liable for any damage caused by such dog to public or private property. The liability of the owner or custodian of the dog shall include consequential damages.

(b) This Code section is to be considered cumulative of other remedies provided by law. There is no intent to eliminate or limit other causes of action which might inure to the owner of any livestock, poultry, or pet animal. (Ga. L. 1969, p. 831, § 4; Ga. L. 2012, p. 1290, § 2/HB 685.)

The 2012 amendment, effective July 1, 2012, in subsection (a), in the first sentence, substituted "while off the owner's or custodian's property" for "goes upon the land of another and", substituted "livestock, poultry, or pet animal" for "livestock or poultry", and substituted "livestock, poultry, or pet animal for injury, death, or damage" for "livestock or poultry for damages, death, or injury" near the end, and added the second sentence; and, in the second sentence of subsection (b), substituted "eliminate" for "do away with"

and substituted "livestock, poultry, or pet animal" for "livestock or poultry" at the end. See the editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

4-8-5. Cruelty to dogs; authorized killing of dogs.

(a) No person shall perform a cruel act on any dog; nor shall any person harm, maim, or kill any dog, or attempt to do so, except that a person may:

(1) Defend his or her person or property, or the person or property of another, from injury or damage being caused by a dog; or

(2) Kill any dog causing injury or damage to any livestock, poultry, or pet animal.

(b) The method used for killing the dog shall be designed to be as humane as is possible under the circumstances. A person who humanely kills a dog under the circumstances indicated in subsection (a) of this Code section shall incur no liability for such death.

(c) This Code section shall not be construed to limit in any way the authority or duty of any law enforcement officer, dog or rabies control

officer, humane society, or veterinarian. (Ga. L. 1969, p. 831, § 5; Ga. L. 2012, p. 1290, § 3/HB 685.)

The 2012 amendment, effective July 1, 2012, inserted “or her” in paragraph (a)(1) and substituted “livestock, poultry, or pet animal” for “livestock or poultry” in paragraph (a)(2). See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General

Assembly, provides, in part, that the amendment of this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

RESEARCH REFERENCES

ALR. — Damages for killing or injuring dog, 61 ALR5th 635.

4-8-6.1. Removal of certain collars from dogs; restitution; exemption.

(a) For the purposes of this Code section, the term “collar” means any electronic or radio transmitting collar that has the purpose of tracking the location of a dog.

(b) No person shall remove a collar from a dog without permission from the dog’s owner with the intention of preventing or hindering the owner from locating such dog, and if such dog is lost or killed as a result of the violator’s removal of such collar, the violator shall be required to pay the dog’s owner restitution in the amount of the actual value of the dog and any associated veterinary expenses.

(c) This Code section shall not apply to an owner or lessee of real property who removes a collar from a dog caught on his or her owned or leased property while such dog remains on such property if such owner or lessee gives notice of such action within 24 hours to the county or municipal law enforcement agency having territorial jurisdiction. (Code 1981, § 4-8-6.1, enacted by Ga. L. 2008, p. 489, § 1/SB 16.)

Effective date. — This Code section became effective July 1, 2008.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Offenses arising under O.C.G.A. § 4-8-6.1 are designated as offenses for which those charged are to be fingerprinted. 2009 Op. Att’y Gen. No. 2009-1.

4-8-7. Penalty for violations of article.

Except as provided in Code Sections 16-12-4 and 16-12-37, any person who violates any provision of this article shall be guilty of a

misdemeanor. (Ga. L. 1969, p. 831, § 7; Ga. L. 1988, p. 824, § 1; Ga. L. 2000, p. 754, § 3.)

The 2000 amendment, effective May 1, 2000, substituted “Except as provided in Code Sections 16-12-4 and 16-12-37, any” for “Any”.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly,

provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

Law reviews. — For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 12 (2000).

ARTICLE 2

RESPONSIBLE DOG OWNERSHIP

Effective date. — This article became effective July 1, 2012. See the editor’s note for applicability.

Cross references. — Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal, § 51-2-7.

Editor’s notes. — Ga. L. 2012, p. 1290, § 4/HB 685, effective July 1, 2012, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 4-8-20 through 4-8-30, re-

lating to dangerous dog control, and was based on Ga. L. 1988, p. 824, § 2; Ga. L. 1989, p. 159, §§ 1-5; Ga. L. 1989, p. 1552, § 15; Ga. L. 2000, p. 1238, § 1; Ga. L. 2000, p. 1589, § 3.

Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the enactment of this article shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Landlord’s Liability for Injury Inflicted by Tenant’s Dog, 85 POF3d 1.

ALR. — Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 68 ALR5th 599.

Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

4-8-20. Short title.

This article shall be known and may be cited as the “Responsible Dog Ownership Law.” (Code 1981, § 4-8-20, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-21. Definitions.

(a) As used in this article, the term:

(1) “Classified dog” means any dog that has been classified as either a dangerous dog or vicious dog pursuant to this article.

(2) “Dangerous dog” means any dog that:

(A) Causes a substantial puncture of a person’s skin by teeth without causing serious injury; provided, however, that a nip,

scratch, or abrasion shall not be sufficient to classify a dog as dangerous under this subparagraph;

(B) Aggressively attacks in a manner that causes a person to reasonably believe that the dog posed an imminent threat of serious injury to such person or another person although no such injury occurs; provided, however, that the acts of barking, growling, or showing of teeth by a dog shall not be sufficient to classify a dog as dangerous under this subparagraph; or

(C) While off the owner's property, kills a pet animal; provided, however, that this subparagraph shall not apply where the death of such pet animal is caused by a dog that is working or training as a hunting dog, herding dog, or predator control dog.

(3) "Local government" means any county or municipality of this state.

(4) "Owner" means any natural person or any legal entity, including, but not limited to, a corporation, partnership, firm, or trust owning, possessing, harboring, keeping, or having custody or control of a dog. In the case of a dog owned by a minor, the term "owner" includes the parents or person in loco parentis with custody of the minor.

(5) "Serious injury" means any physical injury that creates a substantial risk of death; results in death, broken or dislocated bones, lacerations requiring multiple sutures, or disfiguring avulsions; requires plastic surgery or admission to a hospital; or results in protracted impairment of health, including transmission of an infection or contagious disease, or impairment of the function of any bodily organ.

(6) "Vicious dog" means a dog that inflicts serious injury on a person or causes serious injury to a person resulting from reasonable attempts to escape from the dog's attack.

(b) No dog shall be classified as a dangerous dog or vicious dog for actions that occur while the dog is being used by a law enforcement or military officer to carry out the law enforcement or military officer's official duties. No dog shall be classified as a dangerous dog or a vicious dog if the person injured by such dog was a person who, at the time, was committing a trespass, was abusing the dog, or was committing or attempting to commit an offense under Chapter 5 of Title 16. (Code 1981, § 4-8-21, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-22. Jurisdiction; designation of dog control officer; consolidation of services.

(a) A county's jurisdiction for the enforcement of this article shall be the unincorporated area of the county and a municipality's jurisdiction

for such enforcement shall be the territory within the corporate limits of the municipality.

(b) The governing authority of each local government shall designate an individual as dog control officer to aid in the administration and enforcement of the provisions of this article. A person carrying out the duties of dog control officer shall not be authorized to make arrests unless the person is a law enforcement officer having the powers of arrest.

(c) Any county or municipality or any combination of such local governments may enter into agreements with each other for the consolidation of dog control services under this Code section. (Code 1981, § 4-8-22, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-23. Investigations by dog control officer; notice to owner; hearings; determinations by hearing authority; judicial review.

(a) For purposes of this Code section, the term:

(1) “Authority” means an animal control board or local board of health, as determined by the governing authority of a local government.

(2) “Mail” means to send by certified mail or statutory overnight delivery to the recipient’s last known address.

(b) Upon receiving a report of a dog believed to be subject to classification as a dangerous dog or vicious dog within a dog control officer’s jurisdiction, the dog control officer shall make such investigations as necessary to determine whether such dog is subject to classification as a dangerous dog or vicious dog.

(c) When a dog control officer determines that a dog is subject to classification as a dangerous dog or vicious dog, the dog control officer shall mail a dated notice to the dog’s owner within 72 hours. Such notice shall include a summary of the dog control officer’s determination and shall state that the owner has a right to request a hearing from the authority on the dog control officer’s determination within 15 days after the date shown on the notice. The notice shall also provide a form for requesting the hearing and shall state that if a hearing is not requested within the allotted time, the dog control officer’s determination shall become effective for all purposes under this article.

(d) When a hearing is requested by a dog owner in accordance with subsection (c) of this Code section, such hearing shall be scheduled within 30 days after the request is received; provided, however, that such hearing may be continued by the authority for good cause shown.

At least ten days prior to the hearing, the authority conducting the hearing shall mail to the dog owner written notice of the date, time, and place of the hearing. At the hearing, the dog owner shall be given the opportunity to testify and present evidence and the authority conducting the hearing shall receive other evidence and testimony as may be reasonably necessary to sustain, modify, or overrule the dog control officer's determination.

(e) Within ten days after the hearing, the authority which conducted the hearing shall mail written notice to the dog owner of its determination on the matter. If such determination is that the dog is a dangerous dog or a vicious dog, the notice of classification shall specify the date upon which that determination shall be effective. If the determination is that the dog is to be euthanized pursuant to Code Section 4-8-26, the notice shall specify the date by which the euthanasia shall occur.

(f) Judicial review of the authority's final decision may be had in accordance with Code Section 50-13-19. (Code 1981, § 4-8-23, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-24. Impoundment.

A law enforcement officer or dog control officer shall immediately impound a dog if the officer believes the dog poses a threat to the public safety. (Code 1981, § 4-8-24, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-25. Court ordered euthanasia.

The judge of any superior court of competent jurisdiction within this state may order the euthanasia of a dog if the court finds, after notice and opportunity for hearing as provided by Code Section 4-8-23, that the dog has seriously injured a human or presents a danger to humans not suitable for control under this article and:

(1) The owner or custodian of the dog has been convicted of a violation of any state criminal law and the crime was related to such dog; or

(2) Any local governmental authority has filed with the court a civil action requesting the euthanasia of the dog. (Code 1981, § 4-8-25, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-26. Euthanasia for dogs with repeat offenses.

A dog that is found, after notice and opportunity for hearing as provided by Code Section 4-8-23, to have caused a serious injury to a

human on more than one occasion shall be euthanized; provided, however, that no injury occurring before July 1, 2012, shall count for purposes of this Code section. (Code 1981, § 4-8-26, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, “this Code section” was substituted for “this subsection” at the end of the Code section.

4-8-27. Certificates of registration; requirements for issuance of certificate; individuals excluded from receiving registration; limitation of ownership; annual renewal.

(a) It shall be unlawful for an owner to have or possess within this state a classified dog without a certificate of registration issued in accordance with the provisions of this Code section. Certificates of registration shall be nontransferable and shall only be issued to a person 18 years of age or older. No more than one certificate of registration shall be issued per domicile.

(b) Unless otherwise specified by this Code section, a certificate of registration for a dangerous dog shall be issued if the dog control officer determines that the following requirements have been met:

(1) The owner has maintained an enclosure designed to securely confine the dangerous dog on the owner’s property, indoors, or in a securely locked and enclosed pen, fence, or structure suitable to prevent the dangerous dog from leaving such property; and

(2) Clearly visible warning signs have been posted at all entrances to the premises where the dog resides.

(c) Except as provided in subsections (e) and (f) of this Code section, a certificate of registration for a vicious dog shall be issued if the dog control officer determines that the following requirements have been met:

(1) The owner has maintained an enclosure designed to securely confine the vicious dog on the owner’s property, indoors, or in a securely locked and enclosed pen, fence, or structure suitable to prevent the vicious dog from leaving such property;

(2) Clearly visible warning signs have been posted at all entrances to the premises where the dog resides;

(3) A microchip containing an identification number and capable of being scanned has been injected under the skin between the shoulder blades of the dog; and

(4) The owner maintains and can provide proof of general or specific liability insurance in the amount of at least \$50,000.00 issued

by an insurer authorized to transact business in this state insuring the owner of the vicious dog against liability for any bodily injury or property damage caused by the dog.

(d) No certificate of registration shall be issued to any person who has been convicted of two or more violations of this article.

(e) No person shall be the owner of more than one vicious dog.

(f) No certificate of registration for a vicious dog shall be issued to any person who has been convicted of:

(1) A serious violent felony as defined in Code Section 17-10-6.1;

(2) The felony of dogfighting as provided for in Code Section 16-12-37 or the felony of aggravated cruelty to animals as provided for in Code Section 16-12-4; or

(3) A felony involving trafficking in cocaine, illegal drugs, marijuana, methamphetamine, or ecstasy as provided for in Code Sections 16-13-31 and 16-13-31.1

from the time of conviction until two years after completion of his or her sentence, nor to any person residing with such person.

(g) Certificates of registration shall be renewed on an annual basis. At the time of renewal of a certificate of registration for a vicious dog, a dog control officer shall verify that the owner is continuing to comply with provisions of this article. Failure to renew a certificate of registration within ten days of the renewal date or initial classification date shall constitute a violation of this article. (Code 1981, § 4-8-27, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, a period was substituted for a semicolon at the end of paragraph (b)(2), and paragraphs (f)(A) through (f)(C) were redesignated as paragraphs (f)(1) through (f)(3), respectively.

4-8-28. Notifications by owner; change in ownership of dog; changes in residence.

(a) The owner of a classified dog shall notify the dog control officer within 24 hours if the dog is on the loose or has attacked a human and shall notify the dog control officer within 24 hours if the dog has died or has been euthanized.

(b) A vicious dog shall not be transferred, sold, or donated to any other person unless it is relinquished to a governmental facility or veterinarian to be euthanized.

(c) The owner of a classified dog who moves from one jurisdiction to another within the State of Georgia shall register the classified dog in the new jurisdiction within ten days of becoming a resident and notify

the dog control officer of the jurisdiction from which he or she moved. The owner of a similarly classified dog who moves into this state shall register the dog as required in Code Section 4-8-27 within 30 days of becoming a resident. (Code 1981, § 4-8-28, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-29. Limitations on dog's presence off of owner's premises; penalty for violation; defense.

(a) It shall be unlawful for an owner of a dangerous dog to permit the dog to be off the owner's property unless:

(1) The dog is restrained by a leash not to exceed six feet in length and is under the immediate physical control of a person capable of preventing the dog from engaging any other human or animal when necessary;

(2) The dog is contained in a closed and locked cage or crate; or

(3) The dog is working or training as a hunting dog, herding dog, or predator control dog.

(b) It shall be unlawful for an owner of a vicious dog to permit the dog to be:

(1) Outside an enclosure designed to securely confine the vicious dog while on the owner's property or outside a securely locked and enclosed pen, fence, or structure suitable to prevent the vicious dog from leaving such property unless:

(A) The dog is muzzled and restrained by a leash not to exceed six feet in length and is under the immediate physical control of a person capable of preventing the dog from engaging any other human or animal when necessary; or

(B) The dog is contained in a closed and locked cage or crate; or

(2) Unattended with minors.

(c) A person who violates subsection (b) of this Code section shall be guilty of a misdemeanor of high and aggravated nature.

(d) An owner with a previous conviction for a violation of this article whose classified dog causes serious injury to a human being under circumstances constituting another violation of this article shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than \$5,000.00 nor more than \$10,000.00, or both. In addition, the classified dog shall be euthanized at the cost of the owner.

(e) Any irregularity in classification proceedings shall not be a defense to any prosecution under this article so long as the owner of the

dog received actual notice of the classification and did not pursue a civil remedy for the correction of the irregularity. (Code 1981, § 4-8-29, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Cross references. — Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal, § 51-2-7.

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 2012, “or” was deleted at the end of paragraph (a)(1) and “; or” was substituted for a period at the end of paragraph (a)(2).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. § 4-8-30 are included in the annotations for this Code section.

Absolute liability not imposed. — This Code section does not impose absolute liability on the owner of a dog who

has bitten before, but means that if any person is liable for such bite, it is the owner, and not a government official. *Griffiths v. Schafer*, 223 Ga. App. 560, 478 S.E.2d 625 (1996) (decided under former O.C.G.A. § 4-8-30).

4-8-30. Confiscation by dog control officer; payment of costs for recovery; euthanasia.

(a) A dangerous or vicious dog shall be immediately confiscated by any dog control officer or by a law enforcement officer in the case of any violation of this article. A refusal to surrender a dog subject to confiscation shall be a violation of this article.

(b) The owner of any dog that has been confiscated pursuant to this article may recover such dog upon payment of reasonable confiscation and housing costs and proof of compliance with the provisions of this article. All fines and all charges for services performed by a law enforcement or dog control officer shall be paid prior to owner recovery of the dog. Criminal prosecution shall not be stayed due to owner recovery or euthanasia of the dog.

(c) In the event the owner has not complied with the provisions of this article within 20 days of the date the dog was confiscated, such dog shall be destroyed in an expeditious and humane manner and the owner may be required to pay the costs of housing and euthanasia. (Code 1981, § 4-8-30, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-31. Governmental liability for enforcement.

Under no circumstances shall a local government or any employee or official of a local government be held liable for any damages to any person who suffers an injury inflicted by a dog as a result of a failure to enforce the provisions of this article. (Code 1981, § 4-8-31, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-32. Penalty for violation.

Except as otherwise specified in this article, any person who violates any provision of this article shall be guilty of a misdemeanor. (Code 1981, § 4-8-32, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

4-8-33. Application and compliance.

- (a)(1) Any dog classified prior to July 1, 2012, as a potentially dangerous dog in this state shall on and after that date be classified as a dangerous dog under this article.
- (2) Any dog classified prior to July 1, 2012, as a dangerous dog or vicious dog in this state shall on and after that date be classified as a vicious dog under this article.
- (b) The owner of any dog referred to in subsection (a) of this Code section shall come into compliance with all current provisions of this article by January 1, 2013. (Code 1981, § 4-8-33, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

ARTICLE 3
VICIOUS DOGS

4-8-40 through 4-8-45.

Repealed by Ga. L. 2012, p. 1290, § 5/HB 685, effective July 1, 2012.

Editor's notes. — This article was based on Ga. L. 2006, p. 472, § 1/HB 1497; Ga. L. 2008, p. 114, § 2-1/HB 301.

Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the repeal of this article shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

CHAPTER 10
DEALERS IN EXOTIC BIRDS AND PET BIRDS

Sec.	Sec.
4-10-5. License — Issuance; duration; renewal; fees.	4-10-10. Joint regulation by the Department of Agriculture and the Department of Public Health.
4-10-7.3. Notice and reporting of certain animal diseases.	4-10-12. Penalty.
4-10-9. Enforcement procedure.	

4-10-5. License — Issuance; duration; renewal; fees.

(a) The department shall license bird dealers under the applicable provisions of Chapter 5 of Title 2, the “Department of Agriculture Registration, License, and Permit Act.”

(b) Bird dealers’ licenses shall be issued for a period of one year and shall be annually renewable. The department may establish separate classes of licenses, including wholesale and retail licenses. The department shall fix fees for licenses so that the revenue derived from licenses shall approximate the total direct and indirect costs of administering this chapter; but the annual fee for any such license shall be at least \$50.00 but shall not exceed \$400.00. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. (Ga. L. 1981, p. 510, § 4; Ga. L. 1992, p. 993, § 1; Ga. L. 2010, p. 9, § 1-16/HB 1055.)

The 2010 amendment, effective May 12, 2010, in subsection (b), in the third sentence, substituted “\$50.00” for “\$25.00” and substituted “\$400.00” for “\$200.00” at the end and added the last sentence.

4-10-7.3. Notice and reporting of certain animal diseases.

(a) The Commissioner is authorized to declare certain animal diseases and syndromes to be diseases requiring notice and to require the reporting thereof to the department in a manner and at such times as may be prescribed by the Commissioner. The department shall require that such data be supplied as is deemed necessary and appropriate for the prevention and control of certain diseases and syndromes as are determined by the Commissioner. All such reports and data shall be deemed confidential and shall not be open to inspection by the public; provided, however, that the Commissioner may release such reports and data in statistical form, for valid research purposes, and for other purposes as deemed appropriate by the Commissioner.

(b) Any person, including, but not limited to, any veterinarian or veterinary diagnostic laboratory and practice personnel and any person associated with any bird dealer regulated by this chapter, submitting reports or data in good faith to the department in compliance with this Code section shall not be liable for any civil damages therefor. (Code 1981, § 4-10-7.3, enacted by Ga. L. 2002, p. 1386, § 2.)

Effective date. — This Code section became effective May 16, 2002. enactment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

Law reviews. — For note on the 2002

4-10-9. Enforcement procedure.

(a) Notwithstanding any other provision of law, whenever it may appear to the Commissioner or his agent, either upon investigation or otherwise, that any person has engaged in, or is engaging in, or is about to engage in any act, practice, or transaction which is prohibited by any law or regulation governing activities for which a license is required by this chapter, whether or not the person has so registered or obtained such a license or permit, the Commissioner may issue an order, if he deems it to be in the public interest or necessary for the protection of the citizens of this state, prohibiting such person from continuing such act, practice, or transaction or suspending or revoking any such registration, license, or permit held by such person.

(b) In situations where persons would otherwise be entitled to a hearing prior to an order entered pursuant to subsection (a) of this Code section, the Commissioner may issue such an order to be effective upon a later date without a hearing unless a person subject to the order requests a hearing within ten days after receipt of the order. Failure to make the request shall constitute a waiver of any provision of law for a hearing. The order shall contain or shall be accompanied by a notice of opportunity for hearing, stating that a hearing must be requested within ten days of receipt of the notice and order. The order and notice shall be served in person by the Commissioner or his agent or by certified mail or statutory overnight delivery, return receipt requested. In the case of an individual registered with or issued a license or permit by the department, receipt of the order and notice will be conclusively presumed five days after the mailing of the order by certified mail or statutory overnight delivery, return receipt requested, to the address provided by such person in his most recent registration or license or permit application.

(c) In situations where persons would otherwise be entitled to a hearing prior to an order, the Commissioner may issue an order to be effective immediately if the Commissioner or his agent has reasonable cause to believe that an act, practice, or transaction is occurring or is about to occur, that the situation constitutes a situation of imminent peril to the public safety or welfare, and that the situation therefore requires emergency action. The emergency order shall contain findings to this effect and reasons for the determination. The order shall contain or be accompanied by a notice of opportunity for hearing, which notice may provide that a hearing will be held if and only if a person subject to the order requests a hearing within ten days of the receipt of the order and notice. The order and notice shall be served by the Commissioner or his agent or by certified mail or statutory overnight delivery, return receipt requested. In the case of an individual registered with or issued a license or permit by the department, receipt of the order and

notice will be conclusively presumed five days after the mailing of the order by certified mail or statutory overnight delivery, return receipt requested, to the address provided by such person in his most recent registration or license or permit application.

(d) Any request for hearing made pursuant to subsections (b) and (c) of this Code section shall specify (1) in what respects such person is aggrieved, (2) any and all defenses such person intends to assert at the hearing, (3) affirmation or denial of all the facts and findings alleged in the order, and (4) an address to which any further correspondence or notices in the proceeding may be mailed. Upon such a request for hearing, the Commissioner shall schedule and hold the hearing, unless postponed by mutual consent, within 30 days after receipt by the Commissioner of the request therefor. The Commissioner shall give the person requesting the hearing notice of the time and place of the hearing by certified mail or statutory overnight delivery to the address specified in the request for hearing at least 15 days prior to the time of the hearing.

(e) Except where in conflict with the express provisions of this Code section and the reasonable implication of such provisions, the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," relating to contested cases shall be applicable to the actions of the Commissioner taken pursuant to this Code section and to the conduct and judicial review of any hearings held as a result thereof.

(f) The Commissioner may institute actions or other legal proceedings in any superior court of proper venue as may be required for the enforcement of any law or regulation governing activities for which registration with or a license or permit from the department is required.

(g) The Commissioner may prosecute an action in any superior court of proper venue to enforce any order made by him pursuant to this Code section.

(h) In cases in which the Commissioner institutes an action or other legal proceeding or prosecutes an action to enforce his order, the superior court may, among other appropriate relief, issue a temporary restraining order or a preliminary, interlocutory, or permanent injunction restraining or enjoining persons from engaging in, or acting in concert with anyone engaging in, any acts, practices, or transactions prohibited by orders of the Commissioner or any law or regulation governing activities for which registration with or a license or permit from the department is required. (Ga. L. 1981, p. 510, § 10; Ga. L. 1984, p. 22, § 4; Ga. L. 2000, p. 1589, § 3.)

The 2000 amendment, effective July 1, 2000, substituted "certified mail or statutory overnight delivery" for "certified mail" in the third and the fourth sentences

of subsection (b), in the fourth and fifth sentences of subsection (c), and in the last sentence of subsection (d), respectively.

Editor’s notes. — Ga. L. 2000, p. 1589,

§ 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

4-10-10. Joint regulation by the Department of Agriculture and the Department of Public Health.

If the Department of Public Health elects to regulate the sale or transportation of exotic or pet birds under the authority of Code Section 31-12-9, then the Department of Public Health shall cooperate with the Department of Agriculture in developing and implementing such regulation. (Ga. L. 1981, p. 510, § 7; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

The 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” twice in this Code section.

The 2011 amendment, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community Health” twice in this Code section.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011). For article, “Health: Department of Public Health,” see 28 Ga. St. U.L. Rev. 147 (2011).

4-10-12. Penalty.

Any person who violates any provision of this chapter shall be guilty of a misdemeanor. (Ga. L. 1981, p. 510, § 4; Ga. L. 2002, p. 1386, § 3.)

The 2002 amendment, effective May 16, 2002, substituted “violates any provision of this chapter” for “acts as a bird dealer without a license in violation of this chapter”.

Law reviews. — For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

CHAPTER 11

ANIMAL PROTECTION

Article 1

General Provisions

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Sec.		Sec.	
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4-11-9.4.	Notification of owner; custody of animal.		
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Article 2

Georgia Farm Animal, Crop, and Research Facilities Protection Act

4-11-30.	Short title.
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ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For note on 2000 amendment of O.C.G.A. §§ 4-11-2, 4-11-9 4-11-10, and 4-11-15 to 4-11-17, see 17 Ga. St. U.L. Rev. 12 (2000).

4-11-2. Definitions.

As used in this article, the term:

(1) “Adequate food and water” means food and water which is sufficient in an amount and appropriate for the particular type of animal to prevent starvation, dehydration, or a significant risk to the animal’s health from a lack of food or water.

(1.1) “Animal control officer” means an individual authorized by local law or by the governing authority of a county or municipality to carry out the duties imposed by this article or imposed by local ordinance.

(2) “Animal shelter” means any facility operated by or under contract for the state, a county, a municipal corporation, or any other political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted dogs, cats, and other animals; any veterinary hospital or clinic operated by a veterinarian or veterinarians which operates for such purpose in addition to its customary purposes; and any facility operated, owned, or maintained by a duly incorporated humane society, animal welfare

society, or other nonprofit organization for the purpose of providing for and promoting the welfare, protection, and humane treatment of animals.

(3) “Equine” means any member of the Equidae species, including horses, mules, and asses.

(4) “Humane care” of animals means, but is not limited to, the provision of adequate heat, ventilation, sanitary shelter, and wholesome and adequate food and water, consistent with the normal requirements and feeding habits of the animal’s size, species, and breed.

(5) “Kennel” means any establishment, other than an animal shelter, where dogs or cats are maintained for boarding, holding, training, or similar purposes for a fee or compensation.

(6) “Person” means any person, firm, corporation, partnership, association, or other legal entity, any public or private institution, the State of Georgia, or any county, municipal corporation, or political subdivision of the state.

(7) “Pet dealer” or “pet dealership” means any person who sells, offers to sell, exchanges, or offers for adoption dogs, cats, birds, fish, reptiles, or other animals customarily obtained as pets in this state. However, a person who sells only animals that he or she has produced and raised, not to exceed 30 animals a year, shall not be considered a pet dealer under this article unless such person is licensed for a business by a local government or has a Georgia sales tax number. The Commissioner may with respect to any breed of animals decrease the 30 animal per year exception in the foregoing sentence to a lesser number of any animals for any species that is commonly bred and sold for commercial purposes in lesser quantities. Operation of a veterinary hospital or clinic by a licensed veterinarian shall not constitute the veterinarian as a pet dealer, kennel, or stable under this article.

(8) “Secretary of Agriculture” means the secretary of the United States Department of Agriculture.

(9) “Stable” means any building, structure, pasture, or other enclosure where equines are maintained for boarding, holding, training, breeding, riding, pulling vehicles, or other similar purposes and a fee is charged for maintaining such equines or for the use of such equines. (Code 1981, § 4-11-2, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1990, p. 1650, § 1; Ga. L. 2000, p. 754, § 4.)

The 2000 amendment, effective May 1, 2000, inserted “an” in paragraph (1); added paragraph (1.1); in paragraph (7), inserted “or she” in the second sentence.

and substituted “such person” for “such a person”, substituted “that” for “which” in the third sentence, and inserted “as” in the last sentence; and substituted “secretary of the United” for “Secretary of the United” in paragraph (8).

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

4-11-3. Licenses for pet dealers and kennel, stable, or animal shelter operators; requirement; issuance; application.

(a) It shall be unlawful for any person to act as a pet dealer or operate a kennel, stable, or animal shelter unless such person has a valid license issued by the Commissioner of Agriculture. Any person acting without a license in violation of this subsection shall be guilty of a misdemeanor.

(b) The Commissioner shall license pet dealers and kennel, stable, and animal shelter operators under the applicable provisions of Chapter 5 of Title 2, the “Department of Agriculture Registration, License, and Permit Act.”

(c) Licenses shall be issued for a period of one year and shall be annually renewable. The Commissioner may establish separate classes of licenses, including wholesale and retail licenses. The Commissioner shall fix fees for licenses so that the revenue derived from licenses shall approximate the total direct cost of administering this article. The Commissioner may establish different fees for the different classes of licenses established, but the annual fee for any such license shall be at least \$50.00 but shall not exceed \$400.00. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

(d) Applications for licenses shall be on a form furnished by the Commissioner and, together with such other information as the Commissioner shall require, shall state:

- (1) The name of the applicant;
- (2) The business address of the applicant;
- (3) The complete telephone number of the applicant;
- (4) The location of the pet dealership, kennel, stable, or animal shelter;
- (5) The type of ownership of the pet dealership, kennel, stable, or animal shelter; and
- (6) The name of the owner or, if a partnership, firm, corporation, or other entity, the name of the partners or stockholders.

(e) Notwithstanding the provisions of subsection (c) of this Code section, the license fees fixed pursuant to subsection (c) of this Code

section shall be increased by 100 percent for the renewal of any license which is not renewed within ten days following the expiration date of the license or for the issuance of a new license to any person who has failed to apply for a license within ten days following the date on which written notice of the need for such license has been given to such person by the Commissioner or his authorized representative. (Code 1981, § 4-11-3, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1990, p. 1650, § 2; Ga. L. 1992, p. 1122, § 1; Ga. L. 2010, p. 9, § 1-17/HB 1055.)

The 2010 amendment, effective May 12, 2010, in subsection (c), in the fourth sentence, substituted “\$50.00” for “\$25.00” and substituted “\$400.00” for “\$200.00” at the end and added the last sentence.

4-11-5.1. Euthanasia of dogs and cats by animal shelters or facilities operated for collection of stray, neglected, abandoned, or unwanted animals.

(a) Except as provided in subsection (b) of this Code section, the use of sodium pentobarbital or a derivative of it shall be the exclusive method for euthanasia of dogs and cats by animal shelters or other facilities which are operated for the collection and care of stray, neglected, abandoned, or unwanted animals. A lethal solution shall be used in the following order of preference:

- (1) Intravenous injection by hypodermic needle;
- (2) Intraperitoneal injection by hypodermic needle; or
- (3) If the dog or cat is unconscious, intracardial injection by hypodermic needle.

(b) Notwithstanding subsection (a) of this Code section, any substance which is clinically proven to be as humane as sodium pentobarbital and which has been officially recognized as such by the American Veterinary Medical Association may be used in lieu of sodium pentobarbital to perform euthanasia on dogs and cats, but succinylcholine chloride, curare, curariform mixtures, or any substance which acts as a neuromuscular blocking agent may not be used on a dog or cat in lieu of sodium pentobarbital for euthanasia purposes.

(c) In addition to the exception provided for in subsection (b) of this Code section, in cases of extraordinary circumstance where the dog or cat poses an extreme risk or danger to the veterinarian, physician, or lay person performing euthanasia, such person shall be allowed the use of any other substance or procedure that is humane to perform euthanasia on such dangerous dog or cat.

(d) Under no circumstance shall a chamber using commercially bottled carbon monoxide gas or other lethal gas or a chamber which

causes a change in body oxygen by means of altering atmospheric pressure or which is connected to an internal combustion engine and uses the engine exhaust for euthanasia purposes be permitted.

(e) A dog or cat may be tranquilized with an approved and humane substance before euthanasia is performed.

(f) Euthanasia shall be performed by a licensed veterinarian or physician or a lay person who is properly trained in the proper and humane use of a method of euthanasia. Such lay person shall perform euthanasia under supervision of a licensed veterinarian or physician. This shall not be construed so as to require that a veterinarian or physician be present at the time euthanasia is performed.

(g) No dog or cat may be left unattended between the time euthanasia procedures are first begun and the time death occurs, nor may its body be disposed of until death is confirmed by a qualified person.

(h) The supervising veterinarian or physician shall be subject to all record-keeping requirements and inspection requirements of the State Board of Pharmacy pertaining to sodium pentobarbital and other drugs authorized under subsection (b) of this Code section and may limit the quantity of possession of sodium pentobarbital and other drugs authorized to ensure compliance with the provisions of this Code section. (Code 1981, § 4-11-5.1, enacted by Ga. L. 1990, p. 1686, § 1; Ga. L. 2010, p. 164, § 1/HB 788.)

The 2010 amendment, effective December 31, 2010, in paragraph (a)(3), inserted "If the dog or cat is unconscious, intracardial injection" at the beginning; in subsection (b), substituted a comma for a semicolon at the end of the introductory paragraph, deleted former paragraph (b)(1), and substituted "any substance" for

"(2) Any substance"; in subsection (c), substituted "exception" for "exceptions" near the beginning; added present subsection (d); redesignated former subsections (d) through (g) as present subsections (e) through (h), respectively; and deleted former subsection (h).

4-11-5.2. Microchip reader defined; contacting owner of microchipped pet.

(a) As used in this Code section, the term "microchip reader" means a device designed to read microchips at 125 kHz, both encrypted and nonencrypted, 128 kHz, and 134.2 kHz, and which is ISO 11784 and 11785 compliant.

(b) When any dog, cat, or other large animal traditionally kept as a household pet is brought to an animal shelter or other facility operated for the collection and care of stray, neglected, or abandoned animals, the operator of the facility shall, if the owner of the animal is not known, within 24 hours or as soon as possible scan for the presence of an identifying microchip through the use of a microchip reader. If a

microchip is found, the operator shall make a reasonable effort to contact the owner of the animal. Prior to euthanizing a dog, cat, or other large animal traditionally kept as a household pet, any facility referred to in this subsection shall again scan for the presence of an identifying microchip through the use of a microchip reader.

(c) Shelters and facilities and their employees and the Department of Agriculture shall not be liable for failing to detect a microchip or failing to contact the owner of the animal. Shelter personnel shall not be required to scan any animal they deem to be too vicious or dangerous to permit safe handling. (Code 1981, § 4-11-5.2, enacted by Ga. L. 2010, p. 806, § 1/HB 1106.)

Effective date. — This Code section became effective July 1, 2010.

4-11-6. Applicability of article to nonresidents; consent to jurisdiction; service.

Any person who is not a resident of this state but who engages in this state in any activities for which a license is required by this article shall be subject to this article as to such activities. Each nonresident applicant for a license required by this article shall be required as a condition of licensure to execute a consent to the jurisdiction of the courts of this state for any action filed under this article; and service of process in any such action shall be by certified mail or statutory overnight delivery by the Commissioner. (Code 1981, § 4-11-6, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 1589, § 3.)

The 2000 amendment, effective July 1, 2000, substituted “certified mail or statutory overnight delivery” for “certified mail” in the last sentence.

§ 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Editor’s notes. — Ga. L. 2000, p. 1589,

4-11-9.2. Inspections; impoundment of animals; exceptions.

(a) At any time there is probable cause to believe that a violation of this article or any rule or regulation adopted pursuant to this article has occurred, the Commissioner, his or her designated agent, or an animal control officer who is an employee of state or local government may apply to the appropriate court in the county in which the animal is located for an inspection warrant under the provisions of Code Section 2-2-11.

(b) Any sheriff, deputy sheriff, or other peace officer shall have the authority to enforce the provisions of this article and Code Sections 16-12-4 and 16-12-37.

(c) The Commissioner, his or her designated agent, an animal control officer who is an employee of state or local government, or any sheriff, deputy sheriff, or other peace officer is authorized to impound any animal:

(1) That has not received humane care;

(2) That has been subjected to cruelty in violation of Code Section 16-12-4;

(3) That is used or intended for use in any violation of Code Section 16-12-37; or

(4) If it is determined that a consent order or other order concerning the treatment of animals issued pursuant to this article is being violated.

(d) Prior to an animal being impounded pursuant to paragraph (1), (2), or (3) of subsection (c) of this Code section, a licensed accredited veterinarian approved by the Commissioner or a veterinarian employed by a state or federal government and approved by the Commissioner, shall, at the request of the Commissioner, his or her designee, an animal control officer, a sheriff, a deputy sheriff, or other peace officer, examine and determine the condition or treatment of the animal.

(e) The provisions of this Code section and Code Sections 4-11-9.3 through 4-11-9.6 shall not apply to scientific experiments or investigations conducted by or at an accredited college or university in this state or research facility registered with the Commissioner or the United States Department of Agriculture. (Code 1981, § 4-11-9.2, enacted by Ga. L. 2000, p. 754, § 5.)

Effective date. — This Code section provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly,

4-11-9.3. Caring for an impounded animal.

(a) It shall be the duty of any person impounding an animal under Code Section 4-11-9.2 to make reasonable and proper arrangements to provide the impounded animal with humane care and adequate and necessary veterinary services. Such arrangements may include, but shall not be limited to, providing shelter and care for the animal at any state, federal, county, municipal, or governmental facility or shelter; contracting with a private individual, partnership, corporation, association, or other entity to provide humane care and adequate and necessary veterinary services for a reasonable fee; or allowing a private individual, partnership, corporation, association, or other entity to

provide humane care and adequate and necessary veterinary services as a volunteer and at no cost.

(b) Any person impounding an animal under this article or providing care for an impounded animal shall have a lien on such animal for the reasonable costs of caring for such animal. Such lien may be foreclosed in any court that is competent to hear civil cases, including, but not limited to, magistrate courts. Liens shall be foreclosed in magistrate courts only when the amount of the lien does not exceed the jurisdictional limits established by law for such courts.

(c) Any person impounding an animal under this article shall be authorized to return such animal to its owner, upon payment by the owner of all costs of impoundment and care and upon the entry of a consent order, unless such owner, in a prior administrative or legal action in this state or any other state, was found to have failed to provide humane care to an animal, committed cruelty to animals, or committed an act prohibited under Code Section 16-12-37 in violation of the laws of this state or of the United States or any of the several states. Such consent order shall provide conditions relating to the care and treatment of such animal, including, but not limited to, the following, that:

- (1) Such animal shall be given humane care and adequate and necessary veterinary services;
- (2) Such animal shall not be subjected to cruelty; and
- (3) The owner shall comply with this article.

(d) The provisions of subsection (c) of this Code section shall not apply to an animal that was an object or instrumentality of a crime nor shall any such animal be returned to the owner without the approval of the prosecuting attorney. An agency having custody of an animal that was seized as an object or instrumentality of a crime may, with the consent of the prosecuting attorney, apply to the court having jurisdiction over the offense for an order authorizing such agency to dispose of the animal prior to trial of the criminal case as provided by law. (Code 1981, § 4-11-9.3, enacted by Ga. L. 2000, p. 754, § 5; Ga. L. 2008, p. 114, § 2-2/HB 301.)

Effective date. — This Code section became effective May 1, 2000.

The 2008 amendment, effective May 6, 2008, in the first sentence of subsection (c), substituted “shall be authorized to return such” for “is authorized to return the”, deleted “was” preceding “, in a prior”, inserted “was”, and substituted “committed an act prohibited under Code Section

16-12-37” for “engaged in dog fighting”; and, in paragraphs (c)(1) through (c)(3), substituted “shall” for “will”.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

4-11-9.4. Notification of owner; custody of animal.

(a) It shall be the duty of any person impounding an animal under this article to notify the owner of such animal immediately upon impoundment. Such notice shall state the name and business address of the person impounding the animal, the name and address of the state or local government agency having custody of the animal, a description of the animal, the reason why the animal was impounded, and a statement of the time limits for the owner to respond and request a hearing as provided in Code Section 4-11-9.5. The notice shall be provided by personal service or by registered mail, certified mail, or statutory overnight delivery sent to the last known address of the owner. Service of the notice which complies with subsection (b) of Code Section 9-11-5 shall in all cases be sufficient. If the owner of such animal is unknown or cannot be found, service of the notice on the owner shall be made by posting the notice in a conspicuous place at the location where the animal was impounded and by publishing a notice once in a newspaper of general circulation in the county where the animal was impounded.

(b) An animal impounded pursuant to this article is deemed to be in the custody of the state or local government agency responsible for enforcement of this article within said county or municipality. (Code 1981, § 4-11-9.4, enacted by Ga. L. 2000, p. 754, § 5; Ga. L. 2001, p. 1212, § 1.)

Effective date. — This Code section became effective May 1, 2000.

The 2001 amendment, effective July 1, 2001, substituted “registered mail, certified mail, or statutory overnight delivery” for “registered or certified mail” in the third sentence of subsection (a).

Editor’s notes. — Ga. L. 2000, p. 754,

§ 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

Ga. L. 2001, p. 1212, § 7, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2001.

4-11-9.5. Failure to respond; right to hearing; care; crime exception.

(a) If the owner of an animal impounded pursuant to this article fails to respond in writing within five business days of the date the notice of impoundment was served, or, if the owner is unknown or could not be found within 30 days of publication of the notice of impoundment, the impounded animal may be disposed of pursuant to Code Section 4-11-9.6.

(b)(1) If the owner of an animal impounded pursuant to this article refuses to enter into a consent agreement with the government agency having custody of the animal that such animal will be given humane care and adequate and necessary veterinary care, the owner

may request, in writing, a hearing within five business days of the date the notice of impoundment was served on such owner, or, if the owner is unknown or could not be found, within 30 days of the date of publication of the notice of impoundment. Such request for hearing shall be served upon the government agency having custody of the animal. If no hearing is requested within the time limits specified in this paragraph and the failure to request such hearing is due in whole or in part to the reasonably avoidable fault of the owner, the right to a hearing shall have been waived.

(2) Within 30 days after receiving a written request for a hearing, the government agency having custody of the animal shall hold a hearing as is provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." If the animal is in the custody of an agency of local government which has, by local law or ordinance, established a procedure for hearing such matters, the body designated in such local law or ordinance shall conduct the hearing required by this Code section. If the local government does not have a hearing procedure, the government agency having custody of the animal may refer the matter to the Office of State Administrative Hearings. If the animal is in the custody of the Department of Agriculture, the Commissioner or his or her designee shall conduct the hearing. The hearing shall be public and all testimony shall be received under oath. A record of the proceedings at such hearing shall be made and maintained by the hearing officer as provided in Code Section 50-13-13.

(3) The scope of the hearing shall be limited to whether the impounding of the animal was authorized by subsection (c) of Code Section 4-11-9.2.

(4) The hearing officer shall, within five business days after such hearing, forward a decision to the person who impounded the animal and the government agency having custody of the animal.

(5) If the hearing officer finds that the animal was improperly impounded, the animal shall be returned to the owner and the cost incurred in providing reasonable care and treatment for the animal from the date of impoundment to the date of the order shall be paid by the impounding agency.

(6) If the hearing officer finds that the animal was lawfully impounded, the hearing officer may:

(A) Recommend that the government agency having custody of the animal dispose of the animal as provided in Code Section 4-11-9.6; or

(B) Unless, in a prior administrative or legal action in this state or any other state, the owner has been found to have failed to

provide humane care to an animal, committed cruelty to animals, or committed an act prohibited under Code Section 16-12-37 in violation of the laws of this state or of the United States or any of the several states, recommend conditions under which the animal may, upon payment by the owner of all costs of impoundment and care, be returned to the owner. Such conditions shall be reduced to writing and served upon the owner and the government agency having custody of the animal. Such conditions may include, but are not limited to, the following, that:

- (i) Such animal shall be given humane care and adequate and necessary veterinary services;
- (ii) Such animal shall not be subjected to mistreatment; and
- (iii) The owner shall comply with this article.

(c) The provisions of this Code section shall not apply to an animal that was an object or instrumentality of a crime nor shall any such animal be returned to the owner or disposed of without the approval of the prosecuting attorney. (Code 1981, § 4-11-9.5, enacted by Ga. L. 2000, p. 754, § 5; Ga. L. 2008, p. 114, § 2-3/HB 301.)

Effective date. — This Code section became effective May 1, 2000.

The 2008 amendment, effective May 6, 2008, in subparagraph (b)(6)(B), substituted “committed an act prohibited under Code Section 16-12-37” for “engaged in dog fighting” in the middle of the first sentence, and in divisions (b)(6)(B)(i)

through (b)(6)(B)(iii) substituted “shall” for “will”.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

4-11-9.6. Disposal of impounded animal.

(a) The government agency having custody of an animal impounded pursuant to this article which is not returned to the owner as provided in Code Sections 4-11-9.3 and 4-11-9.5 may dispose of the animal through sale by any commercially feasible means, at a public auction or by sealed bids, or, if in the opinion of a licensed accredited veterinarian or a veterinarian employed by a state or federal government and approved by the Commissioner such animal has a temperament or condition such that euthanasia is the only reasonable course of action, by humanely disposing of the animal.

(b) Any proceeds from the sale of such animal shall be used first to pay the costs associated with the impoundment, including, but not limited to, removal of the animal from the premises, shelter and care of the animal, notice, hearing, and disposition of the animal. Any funds remaining shall:

(1) If the owner is unknown or cannot be found, be paid into the state treasury if the animal was impounded by the Commissioner or his or her designated agent or into the treasury of the local government if the animal was impounded by the sheriff, a deputy sheriff, another law enforcement officer, or an animal control officer; or

(2) If the owner is known, be paid to the owner.

(c) The government agency responsible for conducting the sale shall keep a record of all sales, disbursements, and distributions made under this article. (Code 1981, § 4-11-9.6, enacted by Ga. L. 2000, p. 754, § 5.)

Effective date. — This Code section provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’” became effective May 1, 2000.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly,

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Misrepresentation in Sale of Animal, 35 POF2d 607.

4-11-9.7. Notice and reporting required for certain animal diseases.

(a) The Commissioner is authorized to declare certain animal diseases and syndromes to be diseases requiring notice and to require the reporting thereof to the department in a manner and at such times as may be prescribed by the Commissioner. The department shall require that such data be supplied as is deemed necessary and appropriate for the prevention and control of certain diseases and syndromes as are determined by the Commissioner. All such reports and data shall be deemed confidential and shall not be open to inspection by the public; provided, however, that the Commissioner may release such reports and data in statistical form, for valid research purposes, and for other purposes as deemed appropriate by the Commissioner.

(b) Any person, including, but not limited to, any veterinarian or veterinary diagnostic laboratory and practice personnel and any person associated with any pet dealer, kennel, animal shelter, or stable, submitting reports or data in good faith to the department in compliance with this Code section shall not be liable for any civil damages therefor. (Code 1981, § 4-11-9.7, enacted by Ga. L. 2002, p. 1386, § 4.)

Effective date. — This Code section enactment of this Code section, see 19 Ga. became effective May 16, 2002. St. U.L. Rev. 1 (2002).

Law reviews. — For note on the 2002

4-11-10. Unlawful acts by licensed persons.

It shall be unlawful for any person licensed under this article or any person employed by a person licensed under this article or under such person's supervision or control to:

(1) Commit a violation of Code Section 16-12-4, relating to cruelty to animals;

(2) Fail to keep the pet dealership premises, animal shelter, kennel, or stable in a good state of repair, in a clean and sanitary condition, adequately ventilated, or disinfected when needed;

(3) Fail to provide humane care for any animal; or

(4) Fail to take reasonable care to release for sale, trade, or adoption only those animals that appear to be free of disease, injuries, or abnormalities. (Code 1981, § 4-11-10, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 754, § 6.)

The 2000 amendment, effective May 1, 2000, substituted "such person's" for "his" in the introductory language; deleted ", when such violation occurs on the premises of or is related to the operation of the pet dealership, animal shelter, kennel, or stable for which the license has been issued or any other such facility operated by the same person" from the end of paragraph (1); deleted former paragraph (3) which read: "Fail to provide adequate food and water;"; redesignated former para-

graphs (4) and (5) as present paragraphs (3) and (4), respectively; in paragraph (3), deleted "adequate and" following "provide", deleted "dog, cat, equine, or other" preceding "animal", and deleted "at such facility" following "animal"; and substituted "that" for "which" in paragraph (4).

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-15. Injunctions and restraining orders.

In addition to the remedies provided in this article or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, the Commissioner or, where authorized by the local governing authority, the city or county attorney is authorized to apply to the superior court for an injunction or restraining order. The court shall for good cause shown grant a temporary or permanent injunction or an ex parte or restraining order, restraining or enjoining any person, partnership, firm, corporation, or other entity from violating and continuing to violate this article, any rules and regulations promulgated under this article, Code Section 16-12-4, or Code Section 16-12-37. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation. (Code 1981, § 4-11-15, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 754, § 7.)

The 2000 amendment, effective May 1, 2000, in the first sentence, inserted “or, where authorized by the local governing authority, the city or county attorney”, and substituted “court” for “courts”; and, in the second sentence, substituted “The court shall” for “Such courts shall have jurisdiction and”, deleted “shall” following “cause shown”, substituted a comma for

“or” following “violate this article”, and added “, Code Section 16-12-4, or Code Section 16-12-37” at the end.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

4-11-15.1. Abandonment of domesticated animal.

Notwithstanding the provisions of Code Section 4-11-13, it shall be unlawful for any person knowingly and intentionally to abandon any domesticated animal upon any public or private property or public right of way. This Code section shall not be construed as amending or otherwise affecting the provisions of Chapter 3 of this title, relating to livestock running at large or straying. (Code 1981, § 4-11-15.1, enacted by Ga. L. 2000, p. 754, § 8.)

Effective date. — This Code section became effective May 1, 2000.

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly,

provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

4-11-16. Penalties.

(a) Except as otherwise provided in Code Section 16-12-4 or 16-12-37, any person violating any of the provisions of this article shall be guilty of a misdemeanor and shall be punished as provided in Code Section 17-10-3; provided, however, that if such offense is committed by a corporation, such corporation shall be punished by a fine not to exceed \$1,000.00 for each such violation, community service of not less than 200 hours nor more than 500 hours, or both.

(b) Each violation of this article shall constitute a separate offense. (Code 1981, § 4-11-16, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 754, § 9.)

The 2000 amendment, effective May 1, 2000, substituted the present provisions of this Code section for the former which read: “Any person, partnership, firm, corporation, or other entity violating any of the provisions of this article or any rule or regulation of the Commissioner

adopted pursuant to this article shall be guilty of a misdemeanor.”

Editor’s notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

4-11-17. (Effective until January 1, 2013. See note.) Filing a report regarding animal cruelty; immunity.

(a) Notwithstanding Code Section 24-9-29 or any other provision of law to the contrary, any licensed veterinarian or veterinary technician having reasonable cause to believe that an animal has been subjected to animal cruelty in violation of Code Section 16-12-4 or an act prohibited under Code Section 16-12-37 may make or cause to be made a report of such violation to the Commissioner, his or her designee, an animal control officer, a law enforcement agency, or a prosecuting attorney and may appear and testify in any judicial or administrative proceeding concerning the care of an animal.

(b) Any person participating in the making of a report pursuant to this Code section or participating in any administrative or judicial proceeding pursuant to this article or Title 16 shall, in so doing, be immune from any civil or criminal liability that might otherwise be incurred or imposed, provided such participation pursuant to this Code section or any other law is made in good faith. (Code 1981, § 4-11-17, enacted by Ga. L. 2000, p. 754, § 10; Ga. L. 2008, p. 114, § 2-4/HB 301.)

Effective date. — This Code section became effective May 1, 2000.

The 2008 amendment, effective May 6, 2008, in subsection (a), deleted “accredited” preceding “veterinarian” and substituted “an act prohibited under” for “dog fighting in violation of” near the middle.

Editor’s notes. — Ga. L. 2000, p. 754,

§ 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

Code Section 4-11-17 is set out twice in this Code. The first version is effective until January 1, 2013, and the second version becomes effective on that date.

4-11-17. (Effective January 1, 2013. See note.) Filing a report regarding animal cruelty; immunity.

(a) Notwithstanding Code Section 24-12-31 or any other provision of law to the contrary, any licensed veterinarian or veterinary technician having reasonable cause to believe that an animal has been subjected to animal cruelty in violation of Code Section 16-12-4 or an act prohibited under Code Section 16-12-37 may make or cause to be made a report of such violation to the Commissioner, his or her designee, an animal control officer, a law enforcement agency, or a prosecuting attorney and may appear and testify in any judicial or administrative proceeding concerning the care of an animal.

(b) Any person participating in the making of a report pursuant to this Code section or participating in any administrative or judicial proceeding pursuant to this article or Title 16 shall, in so doing, be immune from any civil or criminal liability that might otherwise be incurred or imposed, provided such participation pursuant to this Code section or any other law is made in good faith. (Code 1981, § 4-11-17,

enacted by Ga. L. 2000, p. 754, § 10; Ga. L. 2008, p. 114, § 2-4/HB 301; Ga. L. 2011, p. 99, § 3/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted “Code Section 24-12-31” for “Code Section 24-9-29” near the beginning of subsection (a). See editor’s note for applicability.

Editor’s notes. — Code Section 4-11-17 is set out twice in this Code. The first version is effective until January 1, 2013, and the second version becomes effective on that date.

Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, “Evidence,” see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

4-11-18. Article cumulative; does not prohibit enactment and enforcement of local ordinances by municipal or county governing authority.

This article shall be cumulative and shall not prohibit the enactment and enforcement of local ordinances by a municipal or county governing authority on this subject which are not in conflict with this article; provided, however, that a municipal or county governing authority shall be required to provide timely written notice to the department of any enforcement action taken pursuant to such an ordinance against an operator licensed under this article who is alleged to be in violation of such local ordinance. The department shall be notified of the initiation of any such local enforcement action and of the final conclusions or ultimate outcome of any such action. (Code 1981, § 4-11-18, enacted by Ga. L. 2002, p. 1419, § 1.)

Effective date. — This Code section became effective July 1, 2002.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, Code

Section 4-11-17, as enacted by Ga. L. 2002, p. 1419, § 1, was redesignated as Code Section 4-11-18.

ARTICLE 2

GEORGIA FARM ANIMAL, CROP, AND RESEARCH FACILITIES PROTECTION ACT

4-11-30. Short title.

This article shall be known and may be cited as the “Georgia Farm Animal, Crop, and Research Facilities Protection Act.” (Code 1981, § 4-11-30, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 2001, p. 888, § 1.)

The 2001 amendment, effective July 1, 2001, inserted “, Crop,”.

4-11-31. Definitions.

As used in this article, the term:

(1) "Actor" means a person accused of any of the offenses defined in Code Section 4-11-32.

(2) "Animal" means any warm or cold-blooded animal or insect which is being used in food or fiber production, agriculture, research, testing, or education, including, but not limited to, hogs, equines, mules, cattle, sheep, ratites, goats, dogs, rabbits, poultry, fish, and bees. The term "animal" shall not include any animal held primarily as a pet.

(3) "Animal facility" includes any vehicle, building, structure, pasture, paddock, pond, impoundment, or premises where an animal is kept, handled, housed, exhibited, bred, or offered for sale and any office, building, or structure where records or documents relating to an animal or to animal research, testing, production, or education are maintained.

(4) "Commissioner" means the Commissioner of Agriculture.

(5) "Consent" means assent in fact, whether express or implied, by the owner or by a person legally authorized to act for the owner which is not:

(A) Induced by force, threat, false pretenses, or fraud;

(B) Given by a person the actor knows, or should have known, is not legally authorized to act for the owner;

(C) Given by a person who by reason of youth, mental disease or defect, or intoxication is known, or should have been known, by the actor to be unable to make reasonable decisions; or

(D) Given solely to detect the commission of an offense.

(5.1) "Crop" shall mean any crops as defined in Code Section 1-3-3.

(5.2) "Crop facility" means any field, building, greenhouse, structure, or premises where crops are grown or offered for sale and any office, building, or structure where records, documents, or electronic data relating to crops or crop research, testing, production, or education are maintained.

(6) "Deprive" means unlawfully to withhold from the owner, interfere with the possession of, free, or dispose of an animal or other property.

(7) "Owner" means a person who has title to the property, lawful possession of the property, or a greater right to possession of the property than the actor.

(8) "Person" means any individual, corporation, association, non-profit corporation, joint-stock company, firm, trust, partnership, two or more persons having a joint or common interest, or other legal entity.

(9) "Possession" means actual care, custody, control, or management.

(10) "Property" means any real or personal property and shall include any document, record, research data, paper, or computer storage medium.

(11) "State" means the State of Georgia. (Code 1981, § 4-11-31, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 1995, p. 244, § 9; Ga. L. 2001, p. 888, § 2.)

The 2001 amendment, effective July 1, 2001, added paragraphs (5.1) and (5.2).

4-11-32. Prohibited acts; applicability.

(a)(1) A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility with the intent to deprive the owner of such facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.

(2) A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over a crop facility, a crop from a crop facility, or other property from a crop facility with the intent to deprive the owner of such facility, crop, or property and to disrupt or damage the enterprise conducted at the crop facility.

(b)(1) A person commits an offense if, without the consent of the owner, the person damages or destroys an animal facility or damages, frees, or destroys any animal or property in or on an animal facility with the intent to disrupt or damage the enterprise conducted at the animal facility and the damage or loss thereto exceeds \$500.00.

(2) A person commits an offense if, without the consent of the owner, the person damages or destroys a crop facility or damages or destroys any crop or property in or on a crop facility with the intent to disrupt or damage the enterprise conducted at the crop facility and the damage or loss thereto exceeds \$500.00.

(c)(1) A person commits an offense if, without the consent of the owner, the person damages or destroys an animal facility or damages, frees, or destroys any animal or property in or on an animal facility

and the damage or loss thereto is \$500.00 or less or enters or remains on an animal facility with the intent to disrupt or damage the enterprise conducted at the animal facility, and the person:

(A) Had notice that the entry was forbidden;

(B) Knew or should have known that the animal facility was or had closed to the public; or

(C) Received notice to depart but failed to do so.

(2) For purposes of this subsection “notice” means:

(A) Oral or written communication by the owner or someone with actual or apparent authority to act for the owner;

(B) The presence of fencing or other type of enclosure or barrier designed to exclude intruders or to contain animals; or

(C) A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(c.1)(1) A person commits an offense if, without the consent of the owner, the person damages or destroys a crop facility or damages or destroys any crop or property in or on a crop facility and the damage or loss thereto is \$500.00 or less or enters or remains on a crop facility with the intent to disrupt or damage the enterprise conducted at the crop facility, and the person:

(A) Had notice that the entry was forbidden;

(B) Knew or should have known that the crop facility was or had closed to the public; or

(C) Received notice to depart but failed to do so.

(2) For purposes of this subsection “notice” means:

(A) Oral or written communication by the owner or someone with actual or apparent authority to act for the owner; or

(B) A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(d) This Code section shall not apply to, affect, or otherwise prohibit actions taken by the Department of Agriculture, any other federal, state, or local department or agency, or any official, employee, or agent thereof while in the exercise or performance of any power or duty imposed by law or by rule and regulation. (Code 1981, § 4-11-32, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 2001, p. 888, § 3.)

The 2001 amendment, effective July 1, 2001, designated the existing provisions of subsection (a) as paragraph (1) and added paragraph (2); designated the existing provisions of subsection (b) as paragraph (1) and added paragraph (2); and added subsection (c.1).

4-11-33. Penalty for violation.

(a) A person convicted of any of the offenses defined in subsections (a) and (b) of Code Section 4-11-32 shall be guilty of a felony and, upon conviction, shall be punished by a fine not to exceed \$10,000.00 or by imprisonment for a term not to exceed three years, or both.

(b) Any person violating subsection (c) or (c.1) of Code Section 4-11-32 shall be guilty of a misdemeanor. (Code 1981, § 4-11-33, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 2001, p. 888, § 4.)

The 2001 amendment, effective July 1, 2001, inserted “or (c.1)” in subsection (b).

CHAPTER 12

INJURIES FROM EQUINE OR LLAMA ACTIVITIES

4-12-1. Legislative findings.

Law reviews. — For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005).

JUDICIAL DECISIONS

Cited in Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996); Burns v. Leap, 285 Ga. App. 307, 645 S.E.2d 751 (2007).

4-12-2. Definitions.

JUDICIAL DECISIONS

Cited in Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996); Young v. Brandt, 225 Ga. App. 889, 485 S.E.2d 519 (1997).

4-12-3. Immunity from liability for injury or death; exceptions.

Law reviews. — For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005).

JUDICIAL DECISIONS

The exception to immunity pertaining to possession and control of the land and facilities applies only to conditions for which warning signs have not been posted. *Muller v. English*, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

The exception to immunity pertaining to willful or wanton disregard for safety did not apply where plaintiff was kicked by the sponsor's horse during a fox hunt since it was shown that the horse was not so unusually prone to kick that continuing to ride it was evidence of willful or wanton disregard for the safety of others. *Muller v. English*, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

Failure to adhere to a traditional fox hunting custom such as tying a red ribbon in the tail of an inexperienced or irritable horse did not rise to the level of willful or wanton disregard. *Muller v. English*, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

The exception to immunity for cases in which the sponsor provided the animal did not apply where the plaintiff was riding her own mount.

Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

Waiver of review of immunity claim. — In a rider's personal injury action against the owners of a horse, the owners waived review of their claim that this chapter provided them immunity from suit as a matter of law, where, in their motion for judgment notwithstanding the verdict, they acquiesced in a trial court ruling that the question of whether warning signs were posted, an element of a claim of immunity, was for the jury. *Young v. Brandt*, 225 Ga. App. 889, 485 S.E.2d 519 (1997).

Immunity as "any other person." — In an action arising from an incident in which a horse reared and fell back on the plaintiff after plaintiff mounted the horse, the defendants were entitled to immunity as "any other person" where the plaintiff neither alleged nor tendered evidence showing the defendants, as equine activity sponsors or as equine professionals, had to have warning signs to trigger immunity. *Wiederkehr v. Brent*, 248 Ga. App. 645, 548 S.E.2d 402 (2001).

4-12-4. **Warning required; effect of failure to comply with notice requirement.**

JUDICIAL DECISIONS

Finding of substantial compliance. — Because the unique circumstances of fox hunting were not expressly contemplated by the Injuries From Equine Activities Act, substantial compliance with the requirements of this section was found where the sponsor of a hunt posted signs at the clubhouse and at various locations

at which the hunt frequently met, and on a vehicle windshield at the place where the hunt met on the day in question, and where the text of the warning sign was contained in a release signed by the plaintiff. *Muller v. English*, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

CHAPTER 13

HUMANE CARE FOR EQUINES

Sec.
4-13-10. Penalty for violation of chapter.

4-13-3. Prohibited acts.

JUDICIAL DECISIONS

Due process issues. — Requiring hearings before impounding horses under the Georgia Humane Care for Equines Act, O.C.G.A. § 4-13-1 et seq., could cause further harm to animals being deprived of adequate food and water, thus, there was no due process violation and defendant agency officials had qualified immunity on

plaintiff animal owner’s claim; the safeguards of O.C.G.A. §§ 4-13-3 and 4-13-4(a) and (b), in connection with any seizure, and the procedure for requesting a hearing under O.C.G.A. § 2-2-9.1(d) after any seizure were adequate. *Reams v. Irvin*, 561 F.3d 1258 (11th Cir. 2009).

4-13-4. Inspection warrants; impoundment authorized; examination.

JUDICIAL DECISIONS

Due process issues. — Requiring hearings before impounding horses under the Georgia Humane Care for Equines Act, O.C.G.A. § 4-13-1 et seq., could cause further harm to animals being deprived of adequate food and water, thus, there was no due process violation and defendant agency officials had qualified immunity on

plaintiff animal owner’s claim; the safeguards of O.C.G.A. §§ 4-13-3 and 4-13-4(a) and (b), in connection with any seizure, and the procedure for requesting a hearing under O.C.G.A. § 2-2-9.1(d) after any seizure were adequate. *Reams v. Irvin*, 561 F.3d 1258 (11th Cir. 2009).

4-13-10. Penalty for violation of chapter.

Except as otherwise provided in Code Section 16-12-4 or 16-12-37, any person, partnership, firm, corporation, or other entity violating any of the provisions of this chapter shall be guilty of a misdemeanor. (Code 1981, § 4-13-10, enacted by Ga. L. 1992, p. 2398, § 2; Ga. L. 2000, p. 754, § 11.)

The 2000 amendment, effective May 1, 2000, substituted “Except as otherwise provided in Code Section 16-12-4 or 16-12-37, any” for “Any”.

§ 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Animal Protection Act of 2000.’”

Editor’s notes. — Ga. L. 2000, p. 754,

CHAPTER 15

DOG AND CAT REPRODUCTIVE STERILIZATION SUPPORT

Sec.

4-15-1. Support program established;
annual report; contributions on
tax returns.

Effective date. — This chapter became effective January 1, 2003.

Editor's notes. — Ga. L. 2002, p. 1215, § 4(b), not codified by the General Assembly, provided: "(b) If an amendment to the Constitution of the State of Georgia authorizing the creation of a special fund for support of the dog and cat reproductive sterilization support program is not ratified at the general election in 2002, Sec-

tions 1 and 2 of this Act shall be repealed in their entirety on January 1, 2003, and no such motor vehicle license plates as contemplated in Sections 1 and 2 of this Act shall be issued pursuant to this Act." That amendment was ratified by the voters at the November 2002 general election so that this chapter became effective January 1, 2003.

4-15-1. Support program established; annual report; contributions on tax returns.

(a) The Commissioner shall establish a dog and cat reproductive sterilization support program and educational activities in support thereof. The department shall utilize moneys placed in a special fund for such program as derived from special license plate sales, any funds appropriated to the department for such purposes, and any voluntary contributions or other funds made available to the department for such purposes for the implementation, operation, and support of such reproductive sterilization program. The Commissioner is authorized to promulgate rules to direct and administer the dog and cat reproductive sterilization support program and to carry out this Code section.

(b) The Commissioner shall submit a report to the Senate Agriculture and Consumer Affairs Committee and the House Committee on Agriculture and Consumer Affairs detailing the receipts of and expenditures from the dog and cat reproductive sterilization support program fund. Such report shall be made not later than the last day of August each year.

(c)(1) Unless an earlier date is deemed feasible and established by the Governor, each Georgia income tax return form for taxable years beginning on or after January 1, 2006, shall contain appropriate language, to be determined by the state revenue commissioner, offering the taxpayer the opportunity to contribute to the Dog and

Cat Sterilization Fund established in subsection (a) of this Code section by either donating all or any part of any tax refund due, by authorizing a reduction in the refund check otherwise payable, or by contributing any amount over and above any amount of tax owed by adding that amount to the taxpayer's payment. The instructions accompanying the income tax return form shall contain a description of the purposes for which this fund was established and the intended use of moneys received from the contributions. Each taxpayer required to file a state income tax return who desires to contribute to the Dog and Cat Sterilization Fund may designate such contribution as provided in this Code section on the appropriate income tax return form.

(2) The Department of Revenue shall determine annually the total amount so contributed, shall withhold therefrom a reasonable amount for administering this voluntary contribution program, and shall transmit the balance to the Department of Agriculture for deposit in the Dog and Cat Sterilization Fund established in subsection (a) of this Code section; provided, however, the amount retained for administrative costs shall not exceed \$50,000.00 per year. If, in any tax year, the administrative costs of the Department of Revenue for collecting contributions pursuant to this subsection exceed the sum of such contributions, the administrative costs which the Department of Revenue is authorized to withhold from such contributions shall not exceed the sum of such contributions. (Code 1981, § 4-15-1, enacted by Ga. L. 2002, p. 1215, § 1; Ga. L. 2005, p. 1131, § 1/HB 452; Ga. L. 2009, p. 303, § 1/HB 117.)

The 2005 amendment, effective July 1, 2005, added subsection (c).

The 2009 amendment, effective April 30, 2009, substituted "Senate Agriculture and Consumer Affairs Committee" for "Senate Agriculture Committee" near the beginning of subsection (b). See the Editor's note for intent.

Editor's notes. — Ga. L. 2009, p. 303,

§ 20, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act."

TITLE 5

APPEAL AND ERROR

Chap.

3. Appeals to Superior or State Court, 5-3-1 through 5-3-31.
5. New Trial, 5-5-1 through 5-5-51.
6. Certiorari and Appeals to Appellate Courts Generally, 5-6-1 through 5-6-51.
7. Appeal or Certiorari by State in Criminal Cases, 5-7-1 through 5-7-5.

CHAPTER 3

APPEALS TO SUPERIOR OR STATE COURT

	Article 2		Sec.	
	Procedure			
Sec.				
5-3-21.	Notice of appeal; form; service.	5-3-30.		gence; dismissal for nonpayment following court order; supersedeas bond.
5-3-22.	Payment of costs prerequisite to appeal; affidavit of indi-			Calendaring appeal; waiver of trial by jury; monetary limitations inapplicable.

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR. — Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

5-3-2. Right to appeal from probate courts; exception.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICABILITY

1. IN GENERAL

JURISDICTION

General Consideration

Cited in *Clark v. Davis*, 242 Ga. App. 425, 530 S.E.2d 49 (2000); *Candies v. Hulsey*, 277 Ga. 630, 593 S.E.2d 353 (2004); *In the Interest of J.R.R.*, 281 Ga. 662, 641 S.E.2d 526 (2007); *Montgomery v. Montgomery*, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Applicability

1. In General

Motion to amend judgment does not extend time to file.

An executrix's appeal from a probate court's decision was untimely and a motion to reconsider, which actually was a motion to amend, did not extend the time for appeal, and, under O.C.G.A. §§ 5-3-2 and 5-3-20, the executrix should have appealed within 30 days of a final order discharging her and ordering that she return a certain amount to the estate. *In re Estate of Thomas*, 285 Ga. App. 615, 647 S.E.2d 326 (2007).

Decedent's non-party mother lacked standing to appeal. — Notwith-

standing a settlement agreement in which the decedent's wife released any interest in the decedent's estate, given that the decedent's mother was not a party in the probate court, despite publication of notice and service by the wife, the mother lacked standing to appeal the probate court's decision to award the wife a year's support. *Booker v. Booker*, 286 Ga. App. 6, 648 S.E.2d 445 (2007).

Jurisdiction

Province of probate court versus proper trial court. — In a child's appeal of a trial court's declaratory judgment that the will of a parent was republished by a codicil and that a portion of a prior order of a probate court that the ex-spouse of the testator was to be treated as if having predeceased the testator was null and void was upheld on appeal as the issue regarding the construction of the will regarding the ex-spouse was a question of law for the trial court and was not within the jurisdiction of the probate court. *Honeycutt v. Honeycutt*, 284 Ga. 42, 663 S.E.2d 232 (2008).

5-3-3. Persons by whom appeal may be entered generally; attorney's authority to appeal to be in writing; dismissal for failure to file same; ratification of unauthorized appeal.

JUDICIAL DECISIONS

Cited in *Schwindler v. State*, 261 Ga. App. 30, 581 S.E.2d 619 (2003).

5-3-5. Appeal by one of several plaintiffs or defendants — Effect of judgment on appeal generally; recovery of damages awarded upon appeal.

JUDICIAL DECISIONS

Decedent's non-party mother lacked standing to appeal. — Notwithstanding a settlement agreement in which the decedent's wife released any interest in the decedent's estate, given that the decedent's mother was not a party in the

probate court, despite publication of notice and service by the wife, the mother lacked standing to appeal the probate court's decision to award the wife a year's support. *Booker v. Booker*, 286 Ga. App. 6, 648 S.E.2d 445 (2007).

ARTICLE 2

PROCEDURE

5-3-20. Time for filing appeals.

JUDICIAL DECISIONS

Motion to amend judgment does not extend time to file.

An executrix's appeal from a probate court's decision was untimely and a motion to reconsider, which actually was a motion to amend, did not extend the time for appeal, and, under O.C.G.A. §§ 5-3-2 and 5-3-20, the executrix should have appealed within 30 days of a final order discharging her and ordering that she return a certain amount to the estate. In re Estate of Thomas, 285 Ga. App. 615, 647 S.E.2d 326 (2007).

Claim was time-barred. — Owner's failure to appeal the rezoning of a neighbor's property precluded the owner from attacking the rezoning decision under Spaulding County, Ga., Unified Development Ordinance § 418 and O.C.G.A. § 5-3-20; a claim that Spaulding County, Ga., Unified Development Ordinance § 414 did not comply with the Georgia Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., was also time-barred, as any challenge to the rezoning had to be raised within 30 days. Hollberg v. Spaulding County, 281 Ga. App. 768, 637 S.E.2d 163 (2006).

Property owners' claims against a county, the county's board of commissioners, and the county's officials were time-barred because, although the owners

appeared and objected throughout a zoning process, the owners failed to file an appeal within 30 days of the zoning resolution that formed the basis of the owners' complaint as required by O.C.G.A. § 5-3-20(a). Instead, the owners waited nearly three years to file a new action, asserting that the owners were entitled to do so because the actions of the zoning board were void. The owners could not be permitted to do indirectly that which the law did not allow to be done directly. Fortson v. Tucker, 307 Ga. App. 694, 705 S.E.2d 895 (2011).

Municipal court judgment. — Where defendant was convicted in a municipal court that was not a city court or court of record and, thus, did not have authority to grant new trials, his motion for a new trial did not toll the 30-day time limit for filing appeals. City of Lawrenceville v. Davis, 233 Ga. App. 1, 502 S.E.2d 794 (1998).

Appeal from action of county commissioners. — An action for a declaratory judgment that a vote of a board of county commissioners resulted in the denial of a rezoning application was improperly dismissed as untimely because the trial court erroneously treated it as an appeal of a zoning decision. Head v. DeKalb County, 246 Ga. App. 756, 542 S.E.2d 176 (2000).

5-3-21. Notice of appeal; form; service.

(a) An appeal to the superior court may be taken by filing a notice of appeal with the court, agency, or other tribunal appealed from. No particular form shall be necessary for the notice of appeal, but the following is suggested:

(NAME OF INFERIOR JUDICATORY)
STATE OF GEORGIA

v.

)
)
)
)
)
)

(Case number
designation)

APPEAL TO SUPERIOR COURT

Notice is hereby given that _____, appellant herein,
and _____, above-named, hereby appeals to the Superior
(plaintiff, defendant, etc.)
Court of _____ County from the judgment (or order, decision,
etc.) entered herein on _____ (date), _____.
Dated: _____.

Attorney For
Appellant

Address

(b) A copy of the notice of appeal shall be served on all parties in the same manner prescribed by Code Section 5-6-32. Failure to perfect service on any party shall not work dismissal, but the superior court shall grant continuances and enter such other orders as may be necessary to permit a just and expeditious determination of the appeal. (Orig. Code 1863, § 3534; Code 1868, § 3557; Ga. L. 1868, p. 131, § 2; Code 1873, § 3614; Code 1882, § 3614; Civil Code 1895, § 4456; Civil Code 1910, § 5001; Code 1933, § 6-103; Ga. L. 1972, p. 738, § 3; Ga. L. 1999, p. 81, § 5.)

The 1999 amendment, effective April 5, 1999, part of an Act to revise, modernize, and correct the Code, deleted “19” from the date line in the form in two places in this Code section.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 68.

ALR. — Sufficiency of “designation” under Federal Appellate Procedure Rule 3(c) of judgment or order appealed from in

civil cases by notice of appeal not specifically designating such judgment or order, 141 ALR Fed 445.

5-3-22. Payment of costs prerequisite to appeal; affidavit of indigence; dismissal for nonpayment following court order; supersedeas bond.

(a) No appeal shall be heard in the superior or state court until any costs which have accrued in the court, agency, or tribunal below have been paid unless the appellant files with the superior or state court or with the court, agency, or tribunal appealed from an affidavit stating that because of indigence he or she is unable to pay the costs on appeal. In all cases, no appeal shall be dismissed in the superior or state court because of nonpayment of the costs below until the appellant has been directed by the court to do so and has failed to comply with the court’s direction.

(b) Filing of the notice of appeal and payment of costs or filing of an affidavit as provided in subsection (a) of this Code section shall act as supersedeas, and it shall not be necessary that a supersedeas bond be filed; provided, however, that the superior or state court upon motion may at any time require that supersedeas bond with good security be given in such amount as the court may deem necessary unless the appellant files with the court an affidavit stating that because of indigence he or she is unable to give bond. (Laws 1799, Cobb’s 1851 Digest, p. 494; Code 1863, § 3536; Code 1868, § 3559; Code 1873, § 3616; Code 1882, § 3616; Civil Code 1895, § 4458; Civil Code 1910, § 5003; Code 1933, § 6-105; Ga. L. 1972, p. 738, § 4; Ga. L. 1995, p. 10, § 5; Ga. L. 2009, p. 647, § 1/HB 324.)

The 2009 amendment, effective July 1, 2009, throughout this Code section, inserted “or state” and substituted “indigence he or she” for “his indigence he”.

JUDICIAL DECISIONS

ANALYSIS

SUPERSEDEAS BOND

Supersedeas Bond

Dispossessory actions. — Subsection (b) is applicable to appeals relating to

dispossessory actions. Walker v. Crane, 216 Ga. App. 765, 455 S.E.2d 855 (1995).

5-3-23. Signature on bond of attorney at law or in fact.**RESEARCH REFERENCES**

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 261.

5-3-27. Amendments to cure defects.**JUDICIAL DECISIONS**

Appeal from city court to superior court correctly dismissed. — Superior court correctly dismissed defendant's appeal from the city court to the superior court, because such appeal from the city court erroneously taken to the superior court to be transferred to the appellate court was

not authorized by O.C.G.A. § 5-3-27. *Sawyer v. City of Atlanta*, 257 Ga. App. 324, 571 S.E.2d 146 (2002).

Cited in *Adams v. State*, 234 Ga. App. 696, 507 S.E.2d 538 (1998); *Register v. Elliott*, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

5-3-29. De novo investigation.**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****EFFECT OF APPEAL ON INFERIOR COURT'S JUDGMENT****SCOPE OF APPEAL****PROCEDURAL ISSUES****General Consideration**

Appeal of the magistrate court judgment to the superior court is a de novo investigation. *Long v. Greenwood Homes, Inc.*, 285 Ga. 560, 679 S.E.2d 712 (2009).

Cited in *Hooper v. Taylor*, 230 Ga. App. 128, 495 S.E.2d 594 (1998); *Clark v. Davis*, 242 Ga. App. 425, 530 S.E.2d 49 (2000); *Giles v. Vastakis*, 262 Ga. App. 483, 585 S.E.2d 905 (2003); *Candies v. Hulsey*, 277 Ga. 630, 593 S.E.2d 353 (2004); *Jessup v. Ray*, 311 Ga. App. 523, 716 S.E.2d 583 (2011).

Effect of Appeal on Inferior Court's Judgment

No waiver of right to trial by jury. — Because: (1) by repealing former provisions of O.C.G.A. § 5-3-30, the Georgia legislature intended that appeals from the probate court to the superior court would continue without special limitations on

the right to a jury trial; and (2) de novo appeals to the superior court from the probate court were to be tried by jury unless the right to a jury trial was waived, given that a widow specifically requested a jury trial, and hence did not waive the right, the trial court erred in denying the widow's request. *Montgomery v. Montgomery*, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Scope of Appeal**Evidence which may be introduced.**

An appeal from the magistrate court was a de novo proceeding in which either party could adduce evidence additional to that originally presented in the magistrate court. *Stamps v. Nelson*, 290 Ga. App. 277, 659 S.E.2d 697 (2008).

Procedural Issues

Evidence of additional damages in trial de novo. — Where plaintiff ap-

pealed to the state court from a magistrate court's decision dismissing its claim and awarding damages to defendant on its counterclaim, and plaintiff had notice of additional damages since the original counterclaim, defendant could present evidence of additional damages of less than \$5,000 relating to its counterclaim, without formal amendment of its pleadings. *Jr. Mills Constr. v. Trichinotis*, 223 Ga. App. 19, 477 S.E.2d 141 (1996).

Issues never raised on appeal. —

Upon a wife's request for year's support, because a son never presented argument or evidence to contest the amount sought by the wife, never sought a hearing on the same, and failed to rebut the wife's claim of entitlement to said support, the son's claims of error on appeal from an order granting the wife summary judgment in the superior court lacked merit. In *re Estate of Avery*, 281 Ga. App. 904, 637 S.E.2d 504 (2006).

5-3-30. Calendaring appeal; waiver of trial by jury; monetary limitations inapplicable.

(a) Upon the filing of an appeal from magistrate court to superior court or state court, the appeal shall be placed upon the court's next calendar for nonjury trial. Such appeals from the magistrate court to superior court or state court shall be tried by the superior court or state court without a jury unless either party files a demand for a jury trial within 30 days of the filing of the appeal or the court orders a jury trial.

(b) Upon filing an appeal pursuant to subsection (a) of this Code section, the monetary limitations provided for in paragraph (5) of Code Section 15-10-2 shall no longer apply to any verdict and judgment entered by the superior or state court. (Laws 1805, Cobb's 1851 Digest, p. 183; Laws 1823, Cobb's 1851 Digest, p. 497; Code 1863, § 3551; Code 1868, § 3574; Code 1873, § 3630; Code 1882, § 3630; Civil Code 1895, § 4472; Civil Code 1910, § 5017; Code 1933, § 6-601; Ga. L. 1988, p. 253, § 1; Ga. L. 1998, p. 552, § 1; Ga. L. 2001, p. 1223, § 1.)

The 1998 amendment, effective July 1, 1998, and applicable to appeals filed on or after July 1, 1998, substituted the present provisions of this Code section for the former provisions which read: "All appeals to the superior court or state court shall be tried by a jury at the first term after the appeal has been entered unless good cause is shown for continuance; provided, however, that trial by jury may be waived by the consent of both parties to trial by the court without a jury as provided in Code Section 9-11-39."

The 2001 amendment, effective July 1, 2001, designated the existing provisions as subsection (a) and added subsection (b).

Cross references. — Juries, T. 15, C. 12.

Law reviews. — For article, "Trial Practice and Procedure," see 53 Mercer L. Rev. 475 (2001). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

JUDICIAL DECISIONS

No waiver of right to trial by jury. — Because: (1) by repealing former provisions of O.C.G.A. § 5-3-30, the Georgia legislature intended that appeals from the

probate court to the superior court would continue without special limitations on the right to a jury trial; and (2) de novo appeals to the superior court from the

probate court were to be tried by jury unless the right to a jury trial was waived, given that a widow specifically requested a jury trial, and hence did not waive the right, the trial court erred in denying the

widow's request. *Montgomery v. Montgomery*, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Cited in *Davis v. Hawkins*, 238 Ga. App. 749, 521 S.E.2d 10 (1999).

5-3-31. Damages assessed for frivolous appeals.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Exclusivity of remedy. — This section does not provide the exclusive remedy for imposition of sanctions for appeals to the superior court; it applies only to cases of

appeal wherein the jury returns a verdict for a sum of money. *Osofsky v. Board of Mayor & Comm'rs*, 237 Ga. App. 404, 515 S.E.2d 413 (1998).

CHAPTER 4

CERTIORARI TO SUPERIOR COURT

5-4-1. When certiorari shall lie; exception.

Law reviews. — For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907

(1996). For annual survey of law on administrative law, see 62 Mercer L. Rev. 1 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DECISIONS SUBJECT TO REVIEW BY CERTIORARI

WHAT IS JUDICIAL ACTION

2. APPLICATION

General Consideration

Relationship to other laws. — Plaintiff's action seeking to set aside a reprimand from defendant city employer via writ of certiorari was remanded to state court because the cause of action was a uniquely state remedy for writ of certiorari to the state court, the resolution of which could turn on a conclusion that the conduct in question was in violation of federal law; the fact that the state court

may look to federal law to determine whether to grant the relief sought by plaintiff did not confer subject matter jurisdiction on the federal court. *Lockette v. City of Albany*, No. 1:05-cv-39(HL), 2005 U.S. Dist. LEXIS 17080 (M.D. Ga. Aug. 11, 2005).

Writ of certiorari as full and adequate remedy at law, etc.

In accord with *Wilson v. Latham*. See *Wallace v. Board of Regents of Univ. Sys. of Ga.*, 967 F. Supp. 1287 (S.D. Ga. 1997).

Review of recorder's court decisions.

The proper procedure for appealing decisions from a county recorder's court is by certiorari to the superior court. *Smith v. Gwinnett County*, 246 Ga. App. 865, 542 S.E.2d 616 (2000).

Voluntary dismissal of request for certiorari. — Absent any judicial determination that dismissal was required for lack of an approved bond, the petitioners were entitled to voluntarily dismiss their first request for certiorari, filed pursuant to O.C.G.A. § 5-4-1, relying on the renewal statute codified at O.C.G.A. § 9-2-61(a), and file a second request after the 30-day limitation period expired. *Buckler v. DeKalb County*, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Firefighter did not have right to writ of certiorari. — Because the firefighter did not have a hearing, the firefighter was correct that the firefighter did not have a right to a writ of certiorari, O.C.G.A. § 5-4-1(a); however, pursuant to Georgia law, when no other specific legal remedy was available and a party had a clear right to have a certain act performed, a party could seek mandamus, O.C.G.A. § 9-6-20. Under Georgia law, this procedure could be used to compel a governmental body to act in compliance with the law, for instance to require a governmental board to hold a hearing as provided by law. *East v. Clayton County*, No. 10-15749, 2011 U.S. App. LEXIS 15925 (11th Cir. Aug. 1, 2011) (Unpublished).

Cited in *Focus Entm't Int'l, Inc. v. Bailey*, 256 Ga. App. 283, 568 S.E.2d 183 (2002).

Decisions Subject to Review by Certiorari

Termination of city employee.

In the employee's case alleging that the employee was improperly terminated by the City of Atlanta, the city, under O.C.G.A. § 5-4-1(a), was not entitled to a writ of certiorari, reversing the decision of the City of Atlanta Civil Service Board reinstating the employee after finding that the employee had been wrongfully terminated; evidence supported the determination that the termination of the em-

ployee pursuant to the reduction in force violated a city ordinance. *City of Atlanta v. Harper*, 276 Ga. App. 460, 623 S.E.2d 553 (2005).

Although a trial court's decision to dismiss an action by dismissed city employees was erroneously based on its determination that the employees had failed to exhaust their administrative remedies from their claim that the reduction-in-force ordinance, Atlanta, Ga., Code § 114-55, was not properly followed, as they had properly appealed to the Service Board and the Board had denied their claims on appeal, the dismissal was proper for other reasons; after the Board's final decision denying the employees' appeals, they failed to properly and timely file a writ of certiorari in the trial court pursuant to O.C.G.A. §§ 5-4-1(a) and 5-4-6 in order to obtain review of that decision. *Jordan v. City of Atlanta*, 283 Ga. App. 285, 641 S.E.2d 275 (2007).

Trial court lacked subject-matter jurisdiction to review, pursuant to a writ of certiorari, the termination of a city employee because a city manager was not acting in a quasi-judicial capacity in permitting an employee to present evidence prior to finalizing the city manager's decision to terminate the employee; the city charter and personnel ordinance did not grant city employees a right to pretermination hearings. *Goddard v. City of Albany*, 285 Ga. 882, 684 S.E.2d 635 (2009).

Termination of county employee. — Certiorari provided an adequate post-deprivation remedy for reviewing the actions of a board of county commissioners in terminating a county administrator. *Board of Comm'rs v. Farmer*, 228 Ga. App. 819, 493 S.E.2d 21 (1997).

Other employment actions. — Writ of certiorari was a remedy to correct errors committed by any inferior judicatory or any person exercising judicial powers, and since the county police sergeant's hearing on the county police sergeant's demotion was a quasi-judicial hearing, and the availability of petitioning for a writ of certiorari was not otherwise limited by law, the county police sergeant was authorized to seek relief in the trial court

without first pursuing a discretionary appeal to the county board of commissioners. *Crumpler v. Henry County*, 257 Ga. App. 615, 571 S.E.2d 822 (2002).

Denial of “line of duty” disability benefits by county school employees board was judicial in nature, and review of the decision by certiorari was required. *Starnes v. Fulton County Sch. Dist.*, 233 Ga. App. 182, 503 S.E.2d 665 (1998).

What Is Judicial Action

2. Application

City council decision denying application for liquor license. — Restaurant owner’s exclusive remedy from the city’s denial of the owner’s application for a liquor license was review of the city’s decisions via writ of certiorari under O.C.G.A. § 5-4-1(a). The hearing on the owner’s application was pursuant to notice, and the parties were provided with the opportunity to appear, to be represented by counsel, and to present evidence. *Rozier v. Mayor, City of Savannah*, 310 Ga. App. 178, 712 S.E.2d 596 (2011).

Hearing before a city procurement appeals hearing officer was a quasi-judicial proceeding as contemplated by this section because the ordinance authorizing the hearing entitled the liti-

gants to a hearing “in accordance with judicial procedures” and because the hearing officer acted judicially, rather than administratively. *Mack v. City of Atlanta*, 227 Ga. App. 305, 489 S.E.2d 357 (1997).

Decision of county board of zoning appeals denying variance. — A county zoning ordinance may specify certiorari as the method for judicial review of a zoning board’s denial of a variance because the board exercises judicial powers when it rules on a variance application. *Jackson v. Spalding County*, 265 Ga. 792, 462 S.E.2d 361 (1995) (overruling *International Funeral Servs., Inc. v. DeKalb County*, 224 Ga. 707, 261 S.E.2d 625 (1979), annotated in bound volume).

Decisions of police chief. — Because the police officer identified no evidence that employees seeking injured on the job benefits were entitled to notice, a hearing in accordance with judicial procedure, and an opportunity to present evidence, the police chief’s action constituted the discretionary exercise of executive power; consequently, the superior court correctly determined that there was no judicial or quasi-judicial action below and properly dismissed the officer’s petition for writ of certiorari under O.C.G.A. § 5-4-1. *Laughlin v. City of Atlanta*, 265 Ga. App. 61, 592 S.E.2d 874 (2004).

5-4-3. Petition for certiorari to inferior judicatories generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DECISIONS FROM WHICH CERTIORARI IS AVAILABLE

1. IN GENERAL
2. APPLICATION

PETITION FOR CERTIORARI

2. SUFFICIENCY OF ASSIGNMENT OF ERROR

General Consideration

Construction with O.C.G.A. § 51-1-27. — Upon the grant of certiorari in a medical malpractice action filed by plaintiff parents against a pediatrician, a nurse, and others, a Georgia trial court did not abuse its discretion by prohibiting the parents from showing that the nurse failed to pass the nursing board examina-

tion, as such evidence was irrelevant, and even if it could be said that it had any probative value, it was substantially outweighed by the danger of undue prejudice. *Snider v. Basilio*, 281 Ga. 261, 637 S.E.2d 40 (2006).

Failure to obtain sanction is not amendable defect. — Failure to obtain the requisite sanction from the appropriate judge is not an amendable defect if the

30-day time requirement for applying for certiorari under § 5-4-6(a) has expired. *Cobb County v. Herren*, 230 Ga. App. 482, 496 S.E.2d 558 (1998).

Action under Dram Shop Act. — Upon certiorari review, given proof of spoliation under O.C.G.A. § 24-2-22 in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of its intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. *Baxley v. Hakiel Indus.*, 282 Ga. 312, 647 S.E.2d 29 (2007).

Decisions from Which Certiorari Is Available

1. In General

Review of a recorder's court decision. — The proper procedure for appealing decisions from a county recorder's court is by certiorari to the superior court. *Smith v. Gwinnett County*, 246 Ga. App. 865, 542 S.E.2d 616 (2000).

2. Application

Analyzing the limits of the public duty doctrine. — Upon certiorari review by the Georgia supreme court to examine a determination by the court of appeals that the public duty doctrine did not ex-

tend to the official actions of building inspectors, but was limited to the police protection activities of law enforcement officers, the supreme court upheld that determination, as: (1) despite a building inspector's contrary claim, the terms "police protection" and "police power" are not synonymous; and (2) case law provides that the public duty doctrine addresses only the provision of police protection services traditionally done by police law enforcement personnel. *Gregory v. Clive*, 282 Ga. 476, 651 S.E.2d 709 (2007).

Petition for Certiorari

2. Sufficiency of Assignment of Error

Must set forth ordinance allegedly violated or deny its existence.

Defendant's petition for writ of certiorari was fatally and fundamentally flawed, as it did not recite the provisions of the statute under which defendant was convicted, so the appellate court had no context within which to review the evidence. *Collier v. Merck*, 261 Ga. App. 831, 584 S.E.2d 1 (2003).

Petition for certiorari from conviction for violation of municipal ordinance should contain provisions of ordinance.

Because a city's petition for certiorari plainly and distinctly asserted the errors complained of, the superior court did not err in denying its motion to dismiss; moreover, the record reflected that the bar managers cited for violation of Atlanta, Ga., Code of Ordinances § 10-46 (1995) preserved the issue as to the constitutionality of the ordinance and its enforcement. *City of Atlanta v. Jones*, 283 Ga. App. 125, 640 S.E.2d 698 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, § 81.

5-4-5. Bond and security required; certificate of payment of costs; oath of security; affidavit of indigence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION COSTS

General Consideration

Judicial notice. — Trial court erred by relying upon a county ordinance not properly in the record to support its conclusion that a writ of certiorari was an appropriate method of judicial review of actions undertaken by a county planning commission in approving a developer's plan to build a subdivision of town homes; as a result, the appellate court was precluded from reviewing the owners' constitutional challenge to the ordinance. *Monterey Cmty. Council v. DeKalb County Planning Comm'n*, 281 Ga. App. 873, 637 S.E.2d 488 (2006).

Construction with O.C.G.A. § 51-1-27. — Upon the grant of certiorari in a medical malpractice action filed by plaintiff parents against a pediatrician, a nurse, and others, a Georgia trial court did not abuse its discretion by prohibiting the parents from showing that the nursing failed to pass the nursing board examination, as such evidence was irrelevant, and even if it could be said that it had any probative value, it was substantially outweighed by the danger of undue prejudice. *Snider v. Basilio*, 281 Ga. 261, 637 S.E.2d 40 (2006).

Arbitration proceedings. — Upon certiorari review, the Court of Appeals erroneously held that the arbitrator, and not the court, should have decided whether arbitration was barred by res judicata, as: (1) no presumption existed that an arbitrator was in a better position than a court to apply a legal doctrine such as res judicata; (2) the parties did not expressly reserve the issue for arbitration; and (3) there was no presumption under Georgia law that the application of a pro-

cedural bar such as res judicata was a matter to be determined exclusively by an arbitrator. *Bryan County v. Yates Paving & Grading Co.*, 281 Ga. 361, 638 S.E.2d 302 (2006).

Action under Dram Shop Act. — Upon certiorari review, given proof of spoliation under O.C.G.A. § 24-2-22 in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian, as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of its intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. *Baxley v. Hakiel Indus.*, 282 Ga. 312, 647 S.E.2d 29 (2007).

Cited in *Buckler v. DeKalb County*, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Costs

Hearing officer could not waive bond requirement. — Trial court erred in granting a petition for a writ of certiorari as the petition was not accompanied by a bond as required by O.C.G.A. § 5-4-5(a), the hearing officer originally hearing the dispute did not have authority to waive the bond requirement, and a bond by amendment under O.C.G.A. § 5-4-10 was invalid as it was not approved by the hearing officer. *Duty Free Air & Ship Supply, Inc. v. Atlanta Duty Free, LLC*, 275 Ga. App. 381, 620 S.E.2d 616 (2005).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, § 81.

5-4-6. Time for application for writ; filing of petition; service of petition and writ.

JUDICIAL DECISIONS

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GENERAL CONSIDERATION

TIME FOR FILING APPLICATION

1. IN GENERAL

NOTICE

General Consideration

Cited in *City of Atlanta v. Houston*, 221 Ga. App. 61, 471 S.E.2d 12 (1996); *Buckler v. DeKalb County*, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Time for Filing Application**1. In General**

Application for writ of certiorari must be made within 30 days, etc.

Failure to obtain the requisite sanction from the appropriate judge is not an amendable defect if the 30-day time requirement for applying for certiorari under subsection (a) has expired. *Cobb County v. Herren*, 230 Ga. App. 482, 496 S.E.2d 558 (1998).

Although a trial court's decision to dismiss an action by dismissed city employees was erroneously based on its determination that the employees had failed to exhaust their administrative remedies from their claim that the reduction-in-force ordinance, Atlanta, Ga., Code § 114-55, was not properly followed, as they had properly appealed to the Service Board and the Board had denied their claims on appeal, the dismissal was proper for other reasons; after the Board's final decision denying the employees' appeals, they failed to properly and timely file a writ of certiorari in the trial court pursuant to O.C.G.A. §§ 5-4-1(a) and 5-4-6 in order to obtain

review of that decision. *Jordan v. City of Atlanta*, 283 Ga. App. 285, 641 S.E.2d 275 (2007).

Timely petition was improperly dismissed. — Superior court improperly dismissed as untimely appellant city's petition for a writ of certiorari challenging a civil service board's decision, as the petition was timely filed for purposes of O.C.G.A. § 5-4-6(a) since: (1) the last day to file the petition fell on Thanksgiving Day; (2) the Friday after Thanksgiving day, like Thanksgiving day, was a legal holiday as set forth in O.C.G.A. § 1-4-1; and (3) the petition was filed on the very next business day, as allowed by O.C.G.A. § 1-3-1(d)(3). *City of Atlanta v. Hector*, 256 Ga. App. 665, 569 S.E.2d 600 (2002).

Notice

Failure to serve judge, not basis for dismissal. — Failure to properly serve respondent, a municipal court judge whose decision was being reviewed, was not a basis for dismissal where the judge made a general appearance and addressed the merits of the case. *Hudson v. Watkins*, 225 Ga. App. 455, 484 S.E.2d 24 (1997).

Failure to serve city. — The "opposite party" in a case of certiorari from a municipal court was the city, not the municipal court judge, and failure to serve the city warranted dismissal of the petition. *Hudson v. Watkins*, 225 Ga. App. 455, 484 S.E.2d 24 (1997).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, §§ 81, 88.

5-4-10. Amendment of petition, bond, answer, and traverse.

JUDICIAL DECISIONS

Failure to serve cannot be cured by amendment. — Failure to serve the opposite party is not a defect which can be cured by amendment under this section. *Hudson v. Watkins*, 225 Ga. App. 455, 484 S.E.2d 24 (1997).

Bond by amendment was invalid. — Trial court erred in granting a petition for a writ of certiorari as the petition was not accompanied by a bond as required by O.C.G.A. § 5-4-5(a), the hearing officer originally hearing the dispute did not have authority to waive the bond requirement, and a bond by amendment under O.C.G.A. § 5-4-10 was invalid as it was not approved by the hearing officer. *Duty Free Air & Ship Supply, Inc. v. Atlanta Duty Free, LLC*, 275 Ga. App. 381, 620 S.E.2d 616 (2005).

Right to amend found. — Absent any judicial determination that dismissal was required for lack of an approved bond, the petitioners were entitled to voluntarily dismiss their first request for certiorari, filed pursuant to O.C.G.A. § 5-4-1, relying on renewal statute codified at O.C.G.A. § 9-2-61(a), and file a second request after the 30-day limitation period had expired. Moreover, the petitioners had the right to amend the certiorari proceedings as to form or substance at any stage, including the right to amend, by substituting a valid bond for a void bond or no bond at all. *Buckler v. DeKalb County*, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

5-4-12. Grounds of error considered generally; scope of review; technical distinctions abolished.

JUDICIAL DECISIONS

Petition for certiorari from conviction for violation of municipal ordinance should contain provisions of ordinance. — Because a city's petition for certiorari plainly and distinctly asserted the errors complained of, the superior court did not err in denying its motion to dismiss; moreover, the record reflected that the bar managers cited for violation of Atlanta, Ga., Code of Ordinances § 10-46 (1995) preserved the issue as to the constitutionality of the ordinance and its enforcement. *City of Atlanta v. Jones*, 283 Ga. App. 125, 640 S.E.2d 698 (2006).

Any evidence test. — The appropriate standard of review to be applied to issues of fact on writ of certiorari to the superior court is whether the decision below was supported by any evidence. *City of Atlanta*

Gov't v. Smith, 228 Ga. App. 864, 493 S.E.2d 51 (1997).

Hearing officer's decision not reversible based on outcome of subsequent criminal trial. — Hearing officer affirmed a county's dismissal of a police officer for conduct unbecoming an officer based on an act of domestic violence; the officer sought a writ of certiorari under O.C.G.A. § 5-4-12(b). Reversal of the hearing officer's decision based on the officer's subsequently being found not guilty of all criminal charges stemming from the incident was improper as this occurred after the hearing officer's decision was issued, was not a part of the administrative record, and was irrelevant to the determination of whether the county properly terminated the officer's

employment. DeKalb County v. Bull, 295 Ga. App. 551, 672 S.E.2d 500 (2009).

5-4-13. Grant of writ for failure to prove venue or time of criminal offense.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, § 88.

5-4-14. Dismissal or return of writ to lower court with instructions; entry by superior court of final decision where no questions of fact involved.

JUDICIAL DECISIONS

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GENERAL CONSIDERATION

General Consideration

Cited in City of Atlanta v. Houston, 221 Ga. App. 61, 471 S.E.2d 12 (1996).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, § 88.

5-4-17. Recovery of costs by defendant generally.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, § 81.

CHAPTER 5
NEW TRIAL

Article 1

Sec.

General Provisions

- Sec.
5-5-1.

Power of probate, superior, state, juvenile, and City of Atlanta courts.
- 5-5-42.

nary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing.
Form for motion for new trial.

Article 3

Procedure

- 5-5-41.

Requirements as to extraordi-

ARTICLE 1
GENERAL PROVISIONS

5-5-1. Power of probate, superior, state, juvenile, and City of Atlanta courts.

(a) The superior, state, and juvenile courts and the City Court of Atlanta shall have power to correct errors and grant new trials in cases or collateral issues in any of the respective courts in such manner and under such rules as they may establish according to law and the usages and customs of courts.

(b) Probate courts shall have power to correct errors and grant new trials in civil cases provided for by Article 6 of Chapter 9 of Title 15 under such rules and procedures as apply to the superior courts. (Laws 1799, Cobb’s 1851 Digest, p. 503; Code 1863, § 3636; Code 1868, § 3661; Code 1873, § 3712; Code 1882, § 3712; Civil Code 1895, § 5474; Civil Code 1910, § 6079; Code 1933, § 70-102; Ga. L. 1986, p. 982, § 4; Ga. L. 2000, p. 862, § 1.)

The 2000 amendment, effective July 1, 2000, in subsection (a), substituted “and juvenile” for “and city” and inserted “and the City Court of Atlanta”.
Law reviews. — For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907

(1996). For annual survey article, “Garbage In, Garbage Out: The Litigation Implosion Over the Unconstitutional Organization and Jurisdiction of the City Court of Atlanta,” see 52 Mercer L. Rev. 49 (2000).

JUDICIAL DECISIONS

Municipal courts may hear motions for new trial. — In a dispossessory action, a municipal court erred in holding that the court lacked jurisdiction to hear a

motion for new trial under O.C.G.A. § 5-5-1. The municipal’s court enacting legislation, 1983 Ga. Laws 4453-4454, § 33, as well as Ga. Const. 1983, Art. VI,

Sec. I, Para. IV, gave the court such jurisdiction. *Nelson v. Powell*, 293 Ga. App. 227, 666 S.E.2d 598 (2008).

Discretion of trial court.

Because the defendant did not rebut the presumption that counsel's conduct was within the broad range of professional conduct, because the trial court consid-

ered and rejected counsel's motion for a mistrial, and because an eyewitness could testify about the certainty of the eyewitness's identification, the defendant was not entitled to a new trial. *Greenwood v. State*, 309 Ga. App. 893, 714 S.E.2d 602 (2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, New Trial, § 1.

ALR. — Excessiveness or adequacy of

damages awarded for injuries causing mental or psychological damage, 52 ALR5th 1.

ARTICLE 2

GROUND S

5-5-20. Verdict contrary to evidence and justice.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

1. IN GENERAL

2. ADEQUACY OF DAMAGES

APPEAL FROM DENIAL OF NEW TRIAL

General Consideration

Authority to grant new trial. — No court except the trial court is vested by O.C.G.A. §§ 5-5-20 and 5-5-21 with the authority to grant a new trial in a matter relating to the weight of the evidence. *Clark v. State*, 249 Ga. App. 97, 547 S.E.2d 734 (2001).

Denial of new trial is in trial judge's discretion.

Trial court did not abuse its discretion in denying defendant's motion for a new trial, as defendant did not show that defendant received ineffective assistance of counsel because the evidence was so overwhelming against defendant that there was not a reasonable probability that the subpoena of the witness and the witness's testimony at trial would have produced a different result; in other words, defendant did not show that defendant was prejudiced by the alleged deficiency of defense

counsel's failure to subpoena a witness. *Cain v. State*, 277 Ga. 309, 588 S.E.2d 707 (2003), overruled in part by *Dickens v. State*, 280 Ga. 320, 627 S.E.2d 587 (2006).

Cited in *In re C.I.W.*, 229 Ga. App. 481, 494 S.E.2d 291 (1997); *High v. Parker*, 234 Ga. App. 675, 507 S.E.2d 530 (1998); *Washington v. State*, 276 Ga. 655, 581 S.E.2d 518 (2003).

Application

1. In General

Trial court's written order granting a new trial on the general grounds was in compliance with the requirements of § 5-5-51. *Jackson Nat'l Life Ins. Co. v. Snead*, 231 Ga. App. 406, 499 S.E.2d 173 (1998).

New trial properly denied. — Trial court properly denied defendant's motion for a new trial, as the evidence presented, when coupled with the victim's clear and

unfettered identification of defendant from a photo array, which was not impermissibly suggestive, supported defendant's convictions, and defendant failed to show that trial counsel, who had over 30 years of criminal defense experience, was ineffective and that there was a reasonable likelihood that but for the alleged errors, the outcome would have been different. *McIvory v. State*, 268 Ga. App. 164, 601 S.E.2d 481 (2004).

Defendant's motion for a new trial was properly denied as defendant's claim that defendant was denied the right of access to the courts by conduct of the prison authorities as such conduct occurred in a post-conviction setting and did not go to the fundamental fairness of the trial as required by O.C.G.A. § 5-5-20 et seq. *Tarvin v. State*, 277 Ga. 509, 591 S.E.2d 777 (2004).

Motion for a new trial by one member of limited liability company (LLC) in an action against other members was properly denied, as resignation by another member from LLC did not constitute a breach of fiduciary duty under the LLC's operating agreement or Georgia law; the remaining member failed to show that the members who resigned from the LLC were prohibited from forming a competing business or soliciting customers of the LLC. *James E. Warren, M.D., P.C. v. Weber & Warren Anesthesia Servs.*, 272 Ga. App. 232, 612 S.E.2d 17 (2005).

In a suit on a guaranty, the trial court did not err in denying a guarantor's motion for a new trial on general grounds, as the jury's award fell within the range of damages established by the evidence, the guarantor consented to the bank's modification of the terms of one of the loans, and the guarantor failed to demonstrate prejudice by the court's instructions. *Beasley v. Wachovia Bank*, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

Because the appellant failed to supply the appellate court with the entire trial transcript in the record on appeal, but only included the pretrial motions and the opening statements at trial, without a complete transcript the court of appeals had to presume that the evidence supported the jury's verdict; thus, a new trial was not warranted. *Parekh v. Wimpy*, 288

Ga. App. 125, 653 S.E.2d 352 (2007), cert. denied, No. S08C0520, 2008 Ga. LEXIS 319 (Ga. 2008).

Trial court properly denied a motion for new trial based on the claim by a dentist and a dental center that a former employee failed to present evidence on the employee's claim of intentional infliction of emotional distress that the dentist's actions in harassing the employee were extreme and outrageous or that the emotional distress suffered by the employee was severe; the evidence of the dentist's pervasive pattern of harassing behavior demonstrated the extreme and outrageous nature of the dentist's conduct, and the severity of the emotional distress suffered by the employee was evidenced by the fact that the employee became so fearful of the dentist that the employee obtained a gun and kept the gun under the employee's bed until the employee moved out of state. *Ferman v. Bailey*, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Trial court did not err in denying a defendant's motion for a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 based on newly discovered evidence because the "new" evidence—that the defendant's girlfriend got "five hundred" from the defendant in connection with the incident—did not come to the defendant's knowledge since the prior trial, and the girlfriend's alleged perjury would not in itself constitute grounds for a new trial. *Jackson v. State*, 294 Ga. App. 555, 669 S.E.2d 514 (2008).

Trial court did not err in denying a defendant's motion for a new trial or the defendant's motion for a directed verdict because the evidence was sufficient for the trial court to find the defendant guilty of burglary in violation of O.C.G.A. § 16-7-1(a) beyond a reasonable doubt where the back window of a home was broken and police found the defendant hiding in a closet under a pile of clothing. *Williams v. State*, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Although the condemnee claimed that the verdict was contrary to law and the evidence because the Department of Transportation's (DOT) expert failed to give any value to the condemnee's loss of access to approximately 3,800 feet of

frontage, the condemnee's claim failed because the record reflected that the expert explained that any access to the DOT bypass along the approximately 3,811 feet of frontage taken along with the 13.022 acres would be limited by the bypass itself and that the condemnee never owned access rights to the bypass. Moreover, the expert explained further that the frontage had been considered in the valuation of the property. *RNW Family P'ship, Ltd. v. DOT*, 307 Ga. App. 108, 704 S.E.2d 211 (2010).

Motion for a new trial was properly denied because: (1) the evidence was sufficient to support the crimes for which the defendant was convicted; (2) the trial court did not abuse the court's discretion by denying the defendant's motion for a change of venue due to pretrial publicity because the excusal percentage of jurors for cause was not indicative of such prejudice as would have mandated a change in venue; (3) no showing of an improper communication from a bailiff to the jury was shown; (4) the trial court properly instructed the jury and did not err in denying the defendant's requested instructions; and (5) a cumulative error rule was inapplicable. *Gear v. State*, 288 Ga. 500, 705 S.E.2d 632 (2011).

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the Child Hearsay Statute, O.C.G.A. § 24-3-16, the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. *Hargrave v. State*, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Trial court did not err in denying the defendant's motion for new trial because the evidence was sufficient to authorize the defendant's conviction for possessing more than one ounce of marijuana; the defendant was presumed to have exclusive possession and control of the marijuana that a police officer found in the car

the defendant was driving. *Nix v. State*, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Trial court did not err in denying the defendant's motion for a new trial because the evidence established the defendant's commission of child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, O.C.G.A. § 16-6-4(c), and supported the verdict; the victim's prior inconsistent statements concerning the defendant's acts of sodomy were allowed to serve as substantive evidence of the defendant's guilt. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Trial court did not err in denying the defendant's motion for new trial because the evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2); defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them, and determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Verdict in amount within range covered by testimony, etc.

Trial court did not err in denying defendant's motion for a new trial, as the evidence was sufficient to support defendant's convictions for malice murder, felony murder, and arson in the shooting death of a victim and the burning of the victim's home. *Parker v. State*, 277 Ga. 439, 588 S.E.2d 683 (2003).

Counsel's remark not grounds for mistrial. — Denial of defendant's motion for a new trial based on the prosecutor's remark in closing that defendant had gone into the robbery business was proper and the remark was not the basis for a mistrial under O.C.G.A. § 5-5-20 since there was sufficient evidence to convict defendant of robbery and the jury's verdict was not contrary to the evidence and principles of justice and equity. *Phillips v. State*, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

No abuse in granting new trial. — Because there was expert evidence that supported a finding of negligence and causation against physicians and their employers in a medical malpractice action by a patient, a verdict in the physicians' favor was not absolutely demanded, and the trial court did not abuse its discretion in granting the patient's motion for new trial, pursuant to O.C.G.A. §§ 5-5-20 and 5-5-50, after the jury rendered a verdict in favor of the physicians. *Bhansali v. Moncada*, 275 Ga. App. 221, 620 S.E.2d 404 (2005).

After a jury entered a special verdict finding that the corporation had notice of an earlier deed securing property in the corporation's declaratory judgment action to determine the priority of its deed over the earlier deed, the corporation's motion for a new trial was properly granted on the ground that the recordation of the earlier deed was so defective as to provide no notice under O.C.G.A. § 44-14-39; the trial court did not abuse its discretion in granting a new trial, even though its grant of judgment notwithstanding the verdict was improper on the ground that evidence supported the jury's verdict, because the evidence, construed in the corporation's favor as required under O.C.G.A. § 5-5-20, did not absolutely demand a verdict that the corporation had actual notice of the earlier deed. *Page v. McKnight Constr.*, 282 Ga. App. 571, 639 S.E.2d 381 (2006).

Premature motion properly denied. — As a deed grantor's motion for a new trial based on the weight of the evidence pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 was premature, it was void and a trial court's denial thereof was not error; further, there could be no review thereof on appeal as an independent error. *Dae v. Patterson*, 295 Ga. App. 818, 673 S.E.2d 306 (2009).

2. Adequacy of Damages

Exorbitant damages. — Trial court erred in denying a railroad's motion for a new trial where the jury verdict awarding an injured employee substantially more than the employee requested for pain and suffering was clearly intended to punish the railroad, which was impermissible un-

der the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., as: (1) the jury found that the employee was 50 percent negligent; (2) the employee's condition had improved, and the employee was attending school, evidencing an ability to adapt to the disability and to improve the employee's economic situation; and (3) the employee's counsel infected closing argument with a plea to the jury to punish the railroad or to reach a verdict that would affect its conduct. *Norfolk S. Ry. v. Blackmon*, 262 Ga. App. 266, 585 S.E.2d 194 (2003).

Appeal from Denial of New Trial

Defendant could challenge the sufficiency of the evidence by appealing the denial of his motion for new trial, even though he did not invoke such a ruling from the court at trial. *Jones v. State*, 219 Ga. App. 780, 466 S.E.2d 667 (1996).

Denial of defendant's motion for new trial was reversed as defendant's right to be present at trial under Ga. Const. 1983, Art. I, Sec. I, Para. XII was violated when the trial court questioned a juror in chambers without defense counsel or the prosecutor present, dismissed the juror, and replaced the juror with an alternate; defendant did not acquiesce in the illegal proceedings and repudiated counsel's silent waiver of the juror's rights at the juror's first opportunity, the hearing on a motion for a new trial, at which the defendant was represented by new counsel. *Sammons v. State*, 279 Ga. 386, 612 S.E.2d 785 (2005).

Although defendant received effective assistance from trial counsel, because defendant did not waive or abandon defendant's claims under O.C.G.A. §§ 5-5-20 and 5-5-21, the trial court erred in denying defendant's motion for new trial. *Hartley v. State*, 299 Ga. App. 534, 683 S.E.2d 109 (2009).

Denial of defendant's motion for new trial upheld. — It was not an abuse of discretion to deny a new trial motion brought by a trustee who was found to have breached the trustee's fiduciary duty to trust beneficiaries by making distributions to a co-trustee under a trust's encroachment provision because the trustee breached the trustee's duty to protect

trust corpus as: (1) the trustee inconsistently required the co-trustee to provide supporting evidence for corpus distributions and let the co-trustee exceed an allotted budget; and (2) the beneficiaries

were damaged by the resulting reduction in trust corpus. *Reliance Trust Co. v. Candler*, No. A11A1807, 2012 Ga. App. LEXIS 336 (Mar. 26, 2012).

RESEARCH REFERENCES

ALR. — Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damage, 52 ALR5th 1.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 ALR5th 1.

5-5-21. Verdict against weight of evidence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

APPEAL OR CERTIORARI FROM DENIAL OF NEW TRIAL

General Consideration

Authority to grant new trial. — No court except the trial court is vested by O.C.G.A. §§ 5-5-20 and 5-5-21 with the authority to grant a new trial in a matter relating to the weight of the evidence. *Clark v. State*, 249 Ga. App. 97, 547 S.E.2d 734 (2001).

Defendant claimed on appeal that a conviction for the unauthorized possession of drugs by an inmate, in violation of O.C.G.A. § 42-5-18(b), was contrary to law, contrary to the evidence, and against the weight of the evidence, and that, on that basis, it was error for the trial court to deny a motion for a new trial, but, under O.C.G.A. § 5-5-21, only the trial court had the authority to grant a new trial on the ground that the verdict was contrary to the weight of the evidence. *Collinsworth v. State*, 276 Ga. App. 58, 622 S.E.2d 419 (2005).

Defendant's argument that the verdict convicting the defendant of the involuntary manslaughter of defendant's 17-month-old son was decidedly and strongly against the weight of the evidence could only be made to a trial court in a motion for new trial, not to an appellate court on appeal. The appellate court did not have the discretion to grant a new

trial on these grounds. *Lewis v. State*, 304 Ga. App. 831, 698 S.E.2d 365 (2010).

Duty upon trial judge to exercise discretion.

Trial court failed to apply the proper standard in assessing the weight of the evidence as requested by the defendant in the defendant's motion for new trial under O.C.G.A. § 5-5-21. The issue was not whether the evidence was sufficient to support the verdict, but whether the verdict was against the weight of the evidence. *Manuel v. State*, 289 Ga. 383, 711 S.E.2d 676 (2011).

On motion for new trial, court may weigh evidence and consider credibility of witnesses.

Trial court did not apply the wrong standard in denying a defendant's motion for new trial by noting, in response to the defendant's argument that the eyewitnesses were not credible, that the credibility of the witnesses was for the jury unless "they were just way in left field." *Tolbert v. State*, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

Cited in *Leeks v. State*, 226 Ga. App. 227, 483 S.E.2d 691 (1997); *In re C.I.W.*, 229 Ga. App. 481, 494 S.E.2d 291 (1997); *High v. Parker*, 234 Ga. App. 675, 507 S.E.2d 530 (1998); *Taylor v. State*, 259 Ga. App. 457, 576 S.E.2d 916 (2003); *Mitchell*

v. State, 262 Ga. App. 759, 586 S.E.2d 686 (2003); Newton v. State, 261 Ga. App. 762, 583 S.E.2d 585 (2003); Celestin v. State, 296 Ga. App. 727, 675 S.E.2d 480 (2009); Delgiudice v. State, 308 Ga. App. 397, 707 S.E.2d 603 (2011); Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011); Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550 (2011); Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Application

Proper standard of review. — In a prosecution for, inter alia, hijacking a motor vehicle, a trial court incorrectly applied the standard in Jackson v. Virginia, 443 U.S. 307 (1979), when deciding a defendant's challenge in a motion for a new trial as to the weight of the evidence; the trial court had to reconsider the claim pursuant to O.C.G.A. § 5-5-21. Rutland v. State, 296 Ga. App. 471, 675 S.E.2d 506 (2009).

Trial court's written order granting a new trial on the general grounds was in compliance with the requirements of § 5-5-51. Jackson Nat'l Life Ins. Co. v. Snead, 231 Ga. App. 406, 499 S.E.2d 173 (1998).

Where some evidence supports verdict.

Because the state proved venue through testimony that the address of the crime scene was in a specific county and because counsel's actions were within the bounds of reasonable professional conduct, the trial court properly denied defendant's motion for a new trial. Henry v. State, 279 Ga. 615, 619 S.E.2d 609 (2005).

Expert evidence. — Driver's motion for a new trial was properly denied where an expert witness in the field of accident reconstruction opined that the second driver's collision was unavoidable since the driver changed lanes immediately in front of the second driver's vehicle. Flynn v. Mack, 259 Ga. App. 882, 578 S.E.2d 488 (2003).

In a suit where plaintiff mulch seller sought money owed for plastic mulch, and defendants, two individuals doing business as a company, counterclaimed regarding crop damage due to the mulch deteriorating prematurely, the trial court did not abuse its discretion in denying the

company's motion for a new trial after the jury returned a verdict in the seller's favor because, despite the company's claim on appeal that the evidence supported a finding of breach of express warranty, the testimony of the seller's vice-president that the seller advised customers on the order form that it could not provide a warranty, provided some evidence to support the verdict. McLeod v. Robbins Ass'n, 260 Ga. App. 347, 579 S.E.2d 748 (2003).

Improper award of damages. — Trial court erred in denying defendants' motion for a new trial pursuant to O.C.G.A. § 5-5-21 in an action by a produce company and a storage company for damages which arose from an alleged joint venture to grow onions, and the packing, grading, and storage of onions thereafter; the trial court erred in awarding the produce company the total amount of lost profits for onions which defendant did not account for, as the agreement provided that defendants and the company would split the profits or losses evenly, and because the storage company failed to provide any evidence of its anticipated expenses, and therefore its proof of lost profits was insufficient as a matter of law. Williamson v. Strickland & Smith, Inc., 263 Ga. App. 431, 587 S.E.2d 876 (2003).

Newly discovered evidence and alleged perjury insufficient for new trial. — Trial court did not err in denying a defendant's motion for a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 based on newly discovered evidence because the "new" evidence—that the defendant's girlfriend got "five hundred" from the defendant in connection with the incident—did not come to the defendant's knowledge since the prior trial, and the girlfriend's alleged perjury would not in itself constitute grounds for a new trial. Jackson v. State, 294 Ga. App. 555, 669 S.E.2d 514 (2008).

As a deed grantor's motion for a new trial based on the weight of the evidence pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 was premature, the motion was void and a trial court's denial thereof was not error; further, there could be no review thereof on appeal as an independent error. Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009).

Motion for judgment notwithstanding verdict as motion for new trial in DUI case. — Assuming that the defendant's post-verdict motion for judgment notwithstanding the verdict was a motion for new trial, it was, nevertheless, wholly without merit because the evidence was sufficient to convict the defendant of driving under the influence (to the extent that the defendant was a less-safe driver, O.C.G.A. § 40-6-391(a)(1)) because a police officer administered two field-sobriety tests, and defendant exhibited clues of impairment on each. *Masood v. State*, 313 Ga. App. 549, 722 S.E.2d 149 (2012).

Appeal or Certiorari From Denial of New Trial

Defendant could challenge the sufficiency of the evidence by appealing the denial of his motion for new trial, even though he did not invoke such a ruling from the court at trial. *Jones v. State*, 219 Ga. App. 780, 466 S.E.2d 667 (1996).

New trial motion denied in criminal case. — Evidence was sufficient to support the convictions of murder, aggravated assault, and firearm possession in connection with the shooting death of the victim because the evidence showed that: (1) the defendant's teenage children made a cell phone call to the children's parents' home to tell the parents that the children were being followed by a motorcycle rider; (2) as the children arrived home, the defendant exited from the house with a handgun; (3) the defendant fired two warning shots at the rider when the rider rode past; (4) the rider turned the motorcycle around and when the rider rode past the house again, the defendant fired again as the defendant claimed that the rider swerved toward the defendant; and (5) this shot struck the victim, resulting in the victim's death. *Gear v. State*, 288 Ga. 500, 705 S.E.2d 632 (2011).

Illustrative cases. — Trial court properly denied defendant's motion for a new trial despite defendant's claim that there was insufficient evidence to prove the identity and value of the items which defendant shoplifted, as there was sufficient evidence to prove the identity and value of the items given that: (1) a store manager saw defendant place items from

the manager's store into the trunk of defendant's car and identified defendant in a showup identification less than 30 minutes later, after defendant was stopped for shoplifting at a second store; (2) the manager from the first store identified a number of items that were found in defendant's trunk as coming from the first store based on the store code markings on the items; and (3) the packages contained pricing labels. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Because a condemnee did not claim lost profits or business losses, the trial court properly limited the condemnee's evidence to the value of the property taken and consequential damages to the remainder; because the jury's valuation was within the range of the evidence, the trial court properly denied the condemnee's motion for a new trial. *Thornton v. DOT*, 275 Ga. App. 401, 620 S.E.2d 621 (2005).

In a suit on a guaranty, the trial court did not err in denying a guarantor's motion for a new trial on general grounds, as the jury's award fell within the range of damages established by the evidence, the guarantor consented to the bank's modification of the terms of one of the loans, and the guarantor failed to demonstrate prejudice by the court's instructions. *Beasley v. Wachovia Bank*, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

Although defendant received effective assistance from trial counsel, because defendant did not waive or abandon defendant's claims under O.C.G.A. §§ 5-5-20 and 5-5-21, the trial court erred in denying defendant's motion for new trial. *Hartley v. State*, 299 Ga. App. 534, 683 S.E.2d 109 (2009).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims had engaged in a heated argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter,

and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passion-

ately, rather than simply in self defense, when the defendant shot an unarmed victim. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

5-5-22. Illegal admission or exclusion of evidence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ADMISSION OVER OBJECTION

1. IN GENERAL

2. APPLICATION

ERRONEOUS EXCLUSION OF EVIDENCE

OBJECTION

General Consideration

Sufficiency of the evidence. — Because an accomplice's testimony was corroborated by defendant's recent possession of a stolen boat as well as defendant's flight from the scene of the crime, the evidence was sufficient to convict defendant of theft by taking; consequently, the trial court properly denied defendant's motion for a new trial. *Johnson v. State*, 275 Ga. App. 161, 620 S.E.2d 433 (2005).

There was sufficient evidence to support a defendant's conviction for felony murder of the love interest of the defendant's spouse, and the trial court did not err by denying the defendant's motions for a directed verdict or for a new trial; the trial court properly concluded that the defendant failed to prove by a preponderance of the evidence that the defendant was incompetent to stand trial based on the testimony of a state psychiatrist who determined that the defendant had some intellectual limitations and a problem with literacy, but found the defendant capable of rational and logical discussion about the circumstances of the incident to be tried, was capable of assisting in the defense, and understood the nature and object of the legal proceedings. The trial court also did not err by refusing the defendant's requested jury charges as the charges either did not relate to the evidence or the charge given was all that was necessary. *Velazquez v. State*, 282 Ga. 871, 655 S.E.2d 806 (2008).

Admission of character evidence. —

Because evidence of defendant's gang membership was admissible both as part of the *res gestae* of the crime and to show motive, the trial court properly denied defendant's motions in limine and for a new trial, even though the evidence implicated defendant's character. *Garibay v. State*, 275 Ga. App. 170, 620 S.E.2d 424 (2005).

Trial court did not err in denying the defendant's motion for a mistrial after an investigating officer testified on cross-examination that the defendant gave the officer a statement right after the defendant had talked with the defendant's parole officer because the testimony followed defense counsel's question regarding the content, not the timing, of the defendant's statement; a passing reference to a defendant's record does not place his or her character in evidence, and a nonresponsive answer that impacts negatively on a defendant's character does not improperly place his or her character in issue. *Lanier v. State*, 288 Ga. 109, 702 S.E.2d 141 (2010).

Similar transaction evidence. —

Trial court properly denied defendant's motion for a new trial, challenging the admission of similar transaction evidence, because the similar transaction evidence properly corroborated the identity, intent, and course of conduct defendant engaged in with regard to two other home invasions with several other perpetrators that

also included the rape of a victim. *Grier v. State*, 290 Ga. App. 59, 658 S.E.2d 827 (2008).

Admission of telephone conversation between defendant and mother.

— Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial, which was based on the admission of a recorded telephone conversation between the defendant and defendant's mother, who stated "because it's on your record," in response to why the defendant could not be disappointed if the defendant was denied bond; the comment was fleeting and was not a direct comment about the defendant's criminal history, and the mother did not comment on the content of the defendant's criminal record or even say, with certainty, that one did or did not exist. *Hamrick v. State*, 304 Ga. App. 378, 696 S.E.2d 403 (2010).

Alleged prosecutorial misconduct.

— Because a prosecutor's comments were directed at defense counsel's failure to rebut or explain the state's evidence and the prosecutor made a permissible analogy, there was no prosecutorial misconduct; consequently, the trial court did not err in denying defendant's motion for a new trial. *Duffy v. State*, 271 Ga. App. 668, 610 S.E.2d 620 (2005).

Co-indictee's statement on polygraph examination. — Trial court did not abuse the court's discretion by declining to declare a mistrial when a co-indictee testified that the co-indictee had taken a polygraph examination because the trial court's prompt curative instructions to the jury to disregard the co-indictee's statement was sufficient to prevent the testimony from having any prejudicial impact; it was highly improbable that the co-indictee's remarks influenced the outcome of the case, in view of the strong weight of the evidence against the defendant. *Gandy v. State*, 290 Ga. 166, 718 S.E.2d 287 (2011).

Motion for new trial properly denied. — Because the police officers saw a vehicle matching a dispatcher's description shortly after receiving the dispatch, and the vehicle attempted to elude them, in violation of O.C.G.A. § 40-6-395(a), the officers had a specific and articulable reason to stop the vehicle; consequently, the

trial court properly denied defendant's motions to suppress, in limine, and for a new trial. *Francis v. State*, 275 Ga. App. 164, 620 S.E.2d 431 (2005).

Admission Over Objection

1. In General

Harmless error in admission of evidence not ground for new trial.

While it was error for a trial court to rule that a prior inconsistent statement needed to be authenticated before it could be used for impeachment, that error was harmless due to the overwhelming evidence of defendant's guilt; defendant was properly denied a new trial on defendant's conviction for aggravated child molestation. Also, while it was error to exclude a prior inconsistent statement by another witness, the fact that the defendant was able to vigorously examine the witness on the statement and the fact that the contents of the statement were made known to the jury rendered that error harmless. *Robinson v. State*, 265 Ga. App. 481, 594 S.E.2d 696 (2004).

While the trial court erred by denying defendant's motion in limine, by overruling defendant's objection on hearsay grounds, and by overruling defense counsel's objections to the prosecution's improper character evidence, it was highly probable that the errors did not contribute to the judgment convicting defendant of trafficking in cocaine; therefore, the defendant was not entitled to a new trial. *Williams v. State*, 312 Ga. App. 693, 719 S.E.2d 501 (2011).

2. Application

Inadvertent reference to insurance in personal injury action did not warrant new trial.

— Because the trial judge took the appropriate curative steps in denying an opposing driver's motions for both a mistrial and a new trial after the suing driver made an inadvertent reference to insurance, including rebuking the suing driver and issuing a curative instruction, the court did not abuse its discretion in denying the opposing driver's motions; moreover, the appeals court could not conclude that the opposing driver suffered any wrong or oppression

as a result of the trial court's orders. *Defusco v. Free*, 287 Ga. App. 313, 651 S.E.2d 458 (2007).

False evidence allegation did not warrant new trial. — Although defendant contended that along with the revocation of defendant's codefendant's plea deal after the codefendant made statements in contradiction of the plea hearing testimony and defendant's assertion that defendant refused to give false testimony to the prosecutor in exchange for a plea deal, proved that the prosecutor knowingly allowed false evidence to be presented to the jury in violation of due process, the trial court did not err when it did not credit the motion for new trial testimony; since defendant's codefendant was not privy to what occurred in the house after the codefendant ran out and defendant did not present any evidence at trial that defendant's codefendant's testimony was false, the revocation of the codefendant's plea deal was inapposite as was defendant's rejection of the plea deal offer. Therefore, the trial court did not err in finding there was no misconduct warranting a new trial pursuant to O.C.G.A. § 5-5-22. *Cooper v. State*, 287 Ga. 861, 700 S.E.2d 593 (2010), overruled on other grounds, *Smith v. State*, 2012 Ga. LEXIS 340 (Ga. 2012).

Expert testimony. — Trial court erred in admitting, over objection, the testimony of the parents' expert witness about the standard of care in the day-care industry regarding the handling of infants in a case where the infant of the parents died at a hospital after being found pale at the infant's day-care center; the correct standard was that of the average parent, the jury did not need expert testimony to understand or apply that standard of care, and the expert's testimony confused the jury. Accordingly, the child-day care center was granted a new trial because the error in admitting the expert testimony was not harmless. *Applebrook Country Dayschool, Inc. v. Thurman*, 264 Ga. App. 591, 591 S.E.2d 406 (2003).

Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial after one of the state's expert witnesses testified about a medical examination the expert made of the victim

that was not reflected in the records the state produced before trial because the doctors who examined the victim shortly after the victim had been injured testified to finding cell death in portions of the victim's brain, resulting in irreversible brain damage; the expert's testimony that the later examination also indicated a permanent brain injury was cumulative of the other medical evidence. *Eskew v. State*, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Testimony regarding codefendant's statement. — Trial court did not err in denying the defendant's motion for mistrial because the defendant did not show any harm resulting from the investigating police officers' testimony regarding the codefendant's statement, which referenced an "individual" with the codefendant on the night of the robbery who could be considered references to a person whom the jury could infer to be the defendant; the evidence against the defendant was overwhelming. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Interview notes not produced. — Assuming that notes of an interview that was suppressed by the state were evidence favorable to the defendant, the defendant failed to show either that the notes were not available to the defendant through reasonable diligence, or that the course of the defendant's trial would have been any different had the notes been produced. Thus, there was no error in the trial court's denial of the defendant's motion for a new trial based upon a Brady violation. *Freeman v. State*, 284 Ga. 830, 672 S.E.2d 644 (2009).

Evidence of arrest on another charge admissible. — Defendant was not denied a fair trial when the jury was allowed to hear evidence of an unrelated arrest because the circumstances of the defendant's arrest for obstruction of, and giving false information to, an officer were admissible as evidence of flight. *Durham v. State*, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Remedial charge sufficient to remedy error. — Trial court did not err in denying the defendant's motion for mistrial because a remedial charge, which repeatedly admonished the jury that an

accomplice's guilty plea was not to be considered in any way with respect to the defendant's guilt, was sufficient to remedy the error of the admission of the plea and render a mistrial unnecessary. *Robinson v. State*, 312 Ga. App. 110, 717 S.E.2d 694 (2011).

Trial court did not abuse the court's discretion in refusing to grant a mistrial after the state elicited hearsay testimony because the trial court took sufficient precautions to exclude the inadmissible evidence from the jury's consideration as evidence. *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

Harmful Brady violation. — Trial court erred in denying the defendant's motion for new trial because the state committed a harmful Brady violation when the state failed to turn over to the defense a written statement that the victim gave to police; the victim's impeachable omission was not known to the defense before or during trial, and the victim's statement was material to the defense since had the statement been disclosed, the outcome of the case could have been different. *Jackson v. State*, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

Erroneous Exclusion of Evidence

No bad faith in failing to turn over videotaped statements. — Defendant's

new trial motion under O.C.G.A. § 5-5-22 was properly denied, as the fact that the state failed to turn over two videotaped statements from defendant's sons, arising from criminal charges due to a domestic dispute, was based on inadvertence rather than bad faith, there was unimpeached eyewitness testimony from other witnesses that was sufficient to support defendant's convictions pursuant to O.C.G.A. § 24-4-8, and there was no showing that defendant suffered the kind of prejudice that undermined confidence in the outcome of the trial; accordingly, defendant's Brady rights were not violated and there was no violation of O.C.G.A. §§ 17-16-6 and 17-16-7. *Ely v. State*, 275 Ga. App. 708, 621 S.E.2d 811 (2005).

Objection

Failure to make objection to admission of illegal evidence, etc.

Defendant's claim that defendant's character was improperly placed into evidence when an officer testified that the officer found defendant's prison identification card in defendant's pocket was waived as defendant failed to make a further objection or renew defendant's motion for a mistrial after a curative instruction was given. *McCullough v. State*, 268 Ga. App. 445, 602 S.E.2d 181 (2004).

RESEARCH REFERENCES

ALR. — Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 ALR5th 229.

5-5-23. Newly discovered evidence.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- EXTRAORDINARY MOTIONS UNDER SECTION
- EXERCISE OF ORDINARY DILIGENCE
- NEWLY DISCOVERED EVIDENCE
 - 1. IN GENERAL
 - 2. CUMULATIVE AND IMPEACHING EVIDENCE
 - 3. APPLICATION
- HEARING OF MOTIONS UNDER SECTION

General Consideration

New trial granted based on error in jury charge. — In a condemnation action, the lessee was entitled to new trial because the trial court erred in its charge to the jury regarding lost profits; the jury instructions misstated the law and, when considered in the context of the charge as a whole, rendered it confusing, contradictory, and unreconcilable. *Action Sound, Inc. v. DOT*, 265 Ga. App. 616, 594 S.E.2d 773 (2004).

Trial court erred in denying new trial. — Trial court erred in not granting beauty pageant operators' motions for judgment notwithstanding the verdict, directed verdict, or a new trial, pursuant to O.C.G.A. §§ 5-5-23 and 9-11-56, in an action by a beauty pageant contestant who was banned from the contest after it was rumored that she was "stuffing" the ballot boxes, as the contestant failed to establish her claim for tortious interference with business relations because she did not offer direct evidence of the operators' actions to her alleged loss of work and earnings following the pageant, nor could the operators be held liable for tortious interference with the contestant's relationships with others, as they were not strangers to those relationships; it was similarly error to deny the motions with respect to the contestant's slander claim, as she failed to show that an employee was directly ordered to make the statements by the employer, there was no respondeat superior liability in slander cases, and the statements between the contest's joint venturers were privileged as intra-corporate communications and accordingly, publication was also not shown. *Galardi v. Steele-Inman*, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

Requirements for grant, etc.

In accord with *Timberlake v. State*. See *Lawrence v. State*, 227 Ga. App. 70, 487 S.E.2d 608 (1997).

To obtain a new trial on the basis of newly discovered evidence, the evidence supporting the motion must be admissible, and must also satisfy six criteria: (1) it must have been discovered after the trial or hearing; (2) its late discovery was not due to lack of diligence; (3) it is so material that its introduction in evidence would

probably produce a different result; (4) it is not cumulative only; (5) the affidavit of the witness must be attached to the motion (or its absence accounted for); and (6) it does not operate only to impeach a witness. *Collins v. Kiah*, 218 Ga. App. 484, 462 S.E.2d 158 (1995).

Movant bears burden of showing meeting of standards, etc.

Although a co-defendant who testified against defendant at defendant's criminal trial indicated that a certain sentence was recommended by the prosecutor's office, and thereafter, a much more lenient sentence was actually imposed on that co-defendant, defendant failed to show that the state committed a Brady violation by not disclosing the more favorable deal that it made with the testifying co-defendant, as the prosecutor testified that the co-defendant had testified accurately as to the sentence recommendation, but that the sheriff's office had sought a more lenient sentence for the defendant, which was in fact imposed; accordingly, defendant's new trial motion was properly denied and the convictions were properly affirmed. *Ford v. State*, 273 Ga. App. 290, 614 S.E.2d 907 (2005).

Where severance not mandatory, denial of new trial not error. — Where defendant's trial counsel did not move to sever defendant's two aggravated assault charges, which were similar in fact pattern and would have presumably been admitted in the trial of the other, it was found that severance was not mandatory and defendant did not show prejudice as a result of the decision to not so move. The trial court did not err in denying defendant's motion for new trial on the ground that defendant's trial attorney rendered ineffective assistance by failing to seek severance of the charges. *Collier v. State*, 266 Ga. App. 345, 596 S.E.2d 795 (2004).

Discretion of judge.

In a situation in which a juror did not admit during voir dire that the juror knew the victim, but during trial, the juror indicated that the juror was unaware by the victim's name that the juror knew the victim, but in fact, the victim had worked in the juror's shop years earlier, the trial court did not err in denying defendant's motion for a new trial, as the juror indi-

cated that the juror would be fair and impartial, the juror had not been dishonest, but merely mistaken, during voir dire, and the trial court was within its discretion because a corrected response by the juror during voir dire would not have provided a valid basis for a challenge for cause. *Todd v. State*, 275 Ga. App. 459, 620 S.E.2d 666 (2005).

New trial under section should not be granted unless it appears different verdict will result.

Because defense counsel went over the voluntary manslaughter statute with defendant and explained intent to defendant, defendant failed to show that counsel was ineffective; because defendant's plea was freely and voluntarily made, the trial court did not err in denying defendant's motion for new trial. *Howard v. State*, 274 Ga. App. 861, 619 S.E.2d 363 (2005).

Ineffective assistance of appellate counsel not shown. — Defendant failed to meet defendant's burden in order to show that defendant's counsel rendered ineffective assistance at trial, pursuant to the Strickland standard under U.S. Const. amend. VI, as the failure to request instructions was shown to be a trial strategy, for which no prejudice was shown, and there was no need to object to an instruction which was a correct statement of the law and was supported by the evidence; further, appellate counsel was not shown to be ineffective because no prejudice was shown and certain issues which were not raised in defendant's new trial motion, pursuant to O.C.G.A. § 5-5-23, were procedurally barred from review on appeal. *Godfrey v. State*, 274 Ga. App. 237, 617 S.E.2d 213 (2005).

Trial court properly denied defendant's motion for a new trial. — The trial court did not abuse the court's discretion in denying the defendant's motion for a new trial based on what was alleged to be newly discovered evidence; the appeals court classified the evidence, at best, as newly available, not newly discovered. *Kilby v. State*, 289 Ga. App. 457, 657 S.E.2d 567 (2008).

Motion properly denied. — Motion for new trial was properly denied as the trial court did not err in concluding that

defendant failed to carry defendant's burden of showing ineffective assistance; trial counsel's decision to pursue the coercion defense, O.C.G.A. § 16-3-26, for armed robbery rather than a mistaken identity defense, was clearly a strategic decision based upon the evidence. *Lewis v. State*, 270 Ga. App. 48, 606 S.E.2d 77 (2004).

Trial court properly denied an injured party's motion for a new trial pursuant to O.C.G.A. § 5-5-23 in a personal injury action; a driver's statements in the answer and pre-trial order were not inconsistent, as both averred that the driver had a green light at the time of the accident, and thus the trial court properly declined to allow cross-examination of the driver as to the pleadings. *Lott v. Hatcher*, 275 Ga. App. 424, 620 S.E.2d 651 (2005).

Evidence sufficient to support denial of motion. — Defendant's convictions for robbery, burglary, and false imprisonment, in violation of O.C.G.A. § 16-8-40(a), O.C.G.A. § 16-7-1(a), and O.C.G.A. § 16-5-41(a), respectively, were supported by sufficient evidence because the victim and a co-defendant both positively identified defendant as a participant in a criminal event, wherein three individuals burst into the victim's apartment, robbed the victim at gunpoint, and tied the victim up; the lack of physical evidence did not alter the sufficiency, as the identification testimony from a photographic line-up and at trial was within the trier of fact's credibility determination, and denial of defendant's new trial motion under O.C.G.A. § 5-5-23 was proper. *Tucker v. State*, 275 Ga. App. 611, 621 S.E.2d 562 (2005).

Cited in *Gardner v. State*, 261 Ga. App. 188, 582 S.E.2d 167 (2003); *Crossley v. State*, 261 Ga. App. 250, 582 S.E.2d 204 (2003); *Dorsey v. State*, 261 Ga. App. 181, 582 S.E.2d 158 (2003); *Floor Pro Packaging, Inc. v. AICCO, Inc.*, 308 Ga. App. 586, 708 S.E.2d 547 (2011).

Extraordinary Motions Under Section

Cannot be based on evidence known or discoverable in permissible time.

Denial of defendant's extraordinary motion for a new trial based on newly discov-

ered evidence was upheld after defendant failed to show, *inter alia*, that the allegedly new evidence came to defendant's knowledge after trial or that the delay in acquiring the evidence was not the result of lack of due diligence. *Alexander v. State*, 264 Ga. App. 34, 589 S.E.2d 857 (2003).

Denial of defendant's motion for a new trial after defendant's conviction for burglary and theft by receiving was not error, as defendant's alleged newly-discovered evidence would have been known prior to trial; defendant knew of a witness' immediate presence during a conversation regarding stolen goods and, therefore, would have known prior to trial that the witness could have testified to the conversation. *Fetter v. State*, 271 Ga. App. 652, 610 S.E.2d 615 (2005).

Claim of innocence in habeas petition was not a constitutional claim. — Petitioner, a death row inmate, argued in his federal habeas petition as a separate claim for relief that petitioner was actually innocent, but that claim failed because actual innocence was not itself a constitutional claim, and was instead a gateway through which a habeas petitioner had to pass to have an otherwise barred constitutional claim considered on the merits; further, the claim was not properly before the federal court, as the petitioner could pursue a claim of actual innocence in state court by filing an extraordinary motion for new trial under O.C.G.A. §§ 5-5-23, 5-5-40, and 5-5-41. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), *aff'd in part and rev'd in part*, 570 F.3d 1283 (11th Cir. Ga. 2009).

Exercise of Ordinary Diligence

Avoidance of juror disqualification by ordinary diligence. — Where a bank deposited a customer, who had filed a slip and fall action against it, four years before trial and when asked whether the customer had any relatives who might become jurors, the customer indicated that a spouse had some but the customer did not know their names, it was held that the bank was on notice that further investigation was required in order to avoid the issue of juror disqualification pursuant to O.C.G.A. § 15-12-135(a); accordingly, the denial of the bank's motion for a new trial

pursuant to O.C.G.A. § 5-5-23, after the verdict was entered in favor of the customer, was properly denied because the bank could have avoided the issue of juror disqualification by use of ordinary diligence. Furthermore, the damages awarded in favor of the customer were not so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake by the jurors. *Patterson Bank v. Gunter*, 263 Ga. App. 424, 588 S.E.2d 270 (2003).

Newly Discovered Evidence

1. In General

Evidence should relate to new material facts, likely to produce different result on second trial.

Defendant's motion for a new trial based on newly discovered evidence was properly denied since defendant claimed that one of the other people riding in a car with defendant asked a testifying witness for bullets for a gun, and thereafter, defendant was convicted for various crimes resulting from the shooting, wounding and deaths of three individuals; this new information was not material and not likely to produce a different result. *Ingram v. State*, 276 Ga. 223, 576 S.E.2d 855 (2003).

Evidence which must have been known before trial ended.

Trial court did not abuse the court's discretion by denying defendant's motion for new trial based upon newly discovered evidence, as defendant had possession of the claimed new evidence, surveillance photos taken at the scene of an armed robbery, at trial, and counsel used these photos in presenting a defense; further, testimony from a newly discovered witness, whom defendant claimed would extrapolate meaning from the evidence, was not newly discovered evidence for purposes of granting a new trial. *Claritt v. State*, 280 Ga. App. 384, 634 S.E.2d 81 (2006).

Evidence which could have been discovered and presented at trial.

Trial court did not err by denying an insurance company's motion for a new trial to consider newly-discovered evi-

dence, pursuant to O.C.G.A. § 5-5-23, because the bankruptcy records which the insurance company wanted the court to consider were available as public records and could have been obtained and introduced during the trial. *VFH Captive Ins. Co. v. Cielinski*, 260 Ga. App. 807, 581 S.E.2d 335 (2003).

In an action by a builder to recover for breach of contract, the buyers were not entitled to a new trial since they failed to point to authority stating that the perjured testimony was grounds for a new trial in a civil case and failed to show that late discovery was not due to lack of diligence. *Hopper v. M & B Builders, Inc.*, 261 Ga. App. 702, 583 S.E.2d 533 (2003).

Claim that there was newly discovered evidence lacked merit because the evidence was available before trial; the evidence that defendant's son was allegedly molested by the victim of the defendant's offenses was known to defendant prior to trial. *Lester v. State*, 278 Ga. App. 247, 628 S.E.2d 674 (2006).

No abuse of discretion found. — Because the “newly discovered evidence” upon which defendant relied merely tended to impeach his co-defendant's trial testimony, the trial court did not abuse the court's discretion in denying defendant's motion for a new trial; there was no evidence that the co-defendant who recanted had been convicted of perjury. *Anderson v. State*, 276 Ga. App. 216, 622 S.E.2d 898 (2005).

2. Cumulative and Impeaching Evidence

Newly discovered evidence will not authorize new trial when merely cumulative or impeaching in character. See *O'Neal v. State*, 238 Ga. App. 446, 519 S.E.2d 244 (1999), cert. denied, 529 U.S. 1039, 120 S. Ct. 1535, 146 L. Ed. 2d 349 (2000).

Where the trial court denied defendant's motion for a new trial under O.C.G.A. § 5-5-23 that was premised upon newly discovered evidence in the form of the testimony of two witnesses that the victim told that the victim had lied at trial, this was insufficient to grant a new trial, as the testimony would have merely impeached the victim's testimony,

which was not a sufficient basis to grant a new trial. *Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

Co-conspirator's testimony was not newly discovered evidence which warranted a new trial, as such, in addition to lacking credibility, was cumulative of the exculpatory evidence which was presented at trial, and impeached the inculpatory testimony of the co-conspirator who was a witness for the prosecution. *Silvers v. State*, 278 Ga. 45, 597 S.E.2d 373 (2004).

Defendant's motion for a new trial based on newly discovered evidence that the victim and similar transaction witness fabricated their allegations was properly denied as: (1) the evidence failed to show that a material witness's trial testimony was physically impossible; and (2) the evidence merely served to impeach the victim's and the similar transaction witness's trial testimony. *Cowan v. State*, 279 Ga. App. 532, 631 S.E.2d 760 (2006).

Trial court did not err by denying defendant's motion for a new trial based on newly discovered evidence with regard to defendant's conviction for making an untrue material statement of fact and omitting other material facts in selling stock to a victim as the four affidavits in support of defendant's motion set forth that, contrary to the victim's testimony on direct examination, defendant had disclosed various legal difficulties to the victim, including defendant's disbarment from the practice of law; the affidavits served only the purpose of impeachment, thus failing to satisfy the final requirement of case law that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. *Haupt v. State*, 290 Ga. App. 616, 660 S.E.2d 383 (2008).

Evidence of perjury by witness insufficient. — Affidavit indicating that defendant's cousin allegedly committed perjury on the stand at defendant's trial was not newly discovered evidence under O.C.G.A. § 5-5-23, and would have served only to impeach the cousin's trial testimony; therefore, such evidence was not a basis for a new trial. *Morrison v. State*, 256 Ga. App. 23, 567 S.E.2d 360 (2002).

Trial court did not abuse the court's

discretion in denying defendant's motion for a new trial as the hearsay evidence of alleged post-trial statements that the victim and the victim's mother made to the relatives of defendant, who had been convicted of two counts of child molestation regarding the victim, that the victim and mother had admitted that they lied at trial about the molestation, only had the effect of impeaching the trial testimony of prosecution witnesses and a new trial would not be granted under such circumstances. *Dowd v. State*, 261 Ga. App. 306, 582 S.E.2d 235 (2003).

Failure by the defendant to comply with former Ga. Ct. App. R. 27(c)(2) because there was no citation of authority or reasoned argument to support an asserted error constituted an abandonment of a claim on appeal that the trial court erred in failing to order a lie detector test for the victim of the defendant's crime; however, even if there was no abandonment of the assertion of error, a new trial would not have been granted pursuant to O.C.G.A. § 5-5-23 because the results of any polygraph test given to the victim would not have done more than impeach the victim's credibility and there was no showing by the defendant that the evidence would not have merely been cumulative. *Hammond v. State*, 282 Ga. App. 478, 638 S.E.2d 893 (2006).

Extrajudicial admissions of party are not merely impeaching, etc.

Trial court properly denied the second defendant's motion for new trial on the basis of newly discovered evidence that a co-defendant lied under oath to obtain a favorable deal because the co-defendant was not convicted of perjury, the second defendant failed to establish that co-defendant's testimony was the purest fabrication, and there was other evidence that supported second defendant's guilt. *Lopez v. State*, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

3. Application

Officers' opinion testimony not evidence. — Defendant was not entitled to a new trial based upon the prosecution having failed to disclose evidence favorable to the defense because two police officers' opinions as to the defendant's guilt were

not evidence and would not have been admissible at trial. *Smith v. State*, 309 Ga. App. 241, 709 S.E.2d 823 (2011), cert. denied, No. S11C1266, 2011 Ga. LEXIS 954 (Ga. 2011).

Improved condition of victim not new evidence. — Although defendant was convicted under O.C.G.A. § 40-6-394, defendant was not entitled to a new trial under O.C.G.A. § 5-5-23, as the newly-discovered evidence that the victim was seen walking would not have produced a different result; evidence of this was produced at trial, and permanent uselessness of a limb was not required for a conviction under O.C.G.A. § 40-6-394. *Adams v. State*, 259 Ga. App. 570, 578 S.E.2d 207 (2003).

Inadequate pre-trial investigation merits new trial. — Defendant's motion for suppression of identification evidence in defendant's trial for armed robbery, in violation of O.C.G.A. § 16-8-41, was properly denied because the photographic line-up presented to the victim was not impermissibly suggestive, as four of the six men were within defendant's age range and had the same color and characteristics about their faces. However, it was error to deny defendant's motion for a new trial pursuant to O.C.G.A. § 5-5-23, where defense counsel rendered ineffective assistance in that counsel failed to conduct a proper pre-trial investigation based on defendant's claim of an alibi for which defendant provided names of witnesses, as there was a reasonable probability that the outcome might have changed if the proper investigation was conducted. *Tenorio v. State*, 261 Ga. App. 609, 583 S.E.2d 269 (2003).

Testimony constituting expert opinions did not present "new and material facts" and such opinion evidence failed to constitute newly discovered evidence within this section. *Wesleyan College v. Weber*, 238 Ga. App. 90, 517 S.E.2d 813 (1999).

Denial of a motion for new trial not abuse of discretion.

Sufficient evidence supported defendant's conviction for malice murder, and there was no merit in defendant's ineffective assistance of counsel claim; therefore, defendant's motion for a new trial was

properly denied. *Jackson v. State*, 277 Ga. 592, 592 S.E.2d 834 (2004).

Trial court properly denied defendant's motion for a new trial based on newly discovered evidence challenging the victim's testimony that the victim knew defendant but had never "partied" or smoked marijuana with defendant as: (1) defendant knew of the dispute as to how well defendant knew the victim; (2) defendant did not show any reason why defendant could not in due diligence have obtained the affidavits at some earlier time; (3) the only issues raised in the affidavits were how well defendant and the victim were acquainted and how they spent their time; and (4) the proffered testimony only went to impeach the witness. *Joyner v. State*, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Defendant's acts, including telephoning a known drug dealer about purchasing cocaine, and driving to an agreed location to make the transaction, sufficiently constituted a substantial step to convict defendant of attempting to possess cocaine; thus, denial of defendant's motion for a new trial was not an abuse of discretion. *Massey v. State*, 267 Ga. App. 482, 600 S.E.2d 437 (2004).

Where they were not submitted until after entry of a directed verdict, copies of a prior declaratory judgment introduced by parties to that proceeding did not constitute newly discovered evidence for purposes of a motion for a new trial. *McMillian v. Rogers*, 223 Ga. App. 699, 479 S.E.2d 7 (1996).

Not only did counsel's testimony support the trial court's ruling denying defendant a new trial, but defendant did not produce evidence as to what defendant should have known at the time of defendant's decision not to testify that defendant did not know, nor how that information would have altered defendant's decision; in any event, defendant failed to show that there was any likelihood that the outcome of the trial would have been different. *Sims v. State*, 278 Ga. 587, 604 S.E.2d 799 (2004).

Trial court did not err in denying a husband's motion for new trial, as the wife presented sufficient evidence for which an equitable division of the value of two properties at issue could have been determined

at the time the property's value began to include an element of marital property. *Maddox v. Maddox*, 278 Ga. 606, 604 S.E.2d 784 (2004).

Defendant was not entitled to new trial based on newly discovered evidence that defendant suffered from pigmentary dispersion syndrome because, even with vision impairment defendant qualified for a Georgia driver's license; further, the argument at trial was that defendant was not looking at the road and was sleep-impaired at the time of the accident, and there was evidence that defendant had been drinking and swerved back and forth across the road making it unlikely that evidence of visual impairment would produce a different outcome. *Harris v. State*, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

There was no manifest abuse of discretion in a trial court's denial of defendant's new trial motion, pursuant to O.C.G.A. § 5-5-23, with respect to the claim that one juror was not impartial because the juror had failed to answer a juror question regarding the juror's relationship to anyone who was convicted of, or a victim of, a child molestation crime, for which defendant was on trial, and it later was discovered that the juror's nephew had been convicted of such a crime six years earlier, as defendant never sought to exclude the juror during the trial, the juror indicated that the juror did not consider the nephew a close relative, and there was no bias or lack of impartiality shown. *Allen v. State*, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Upon convictions of possessing cocaine with intent to distribute and obstructing a law enforcement officer, the trial court properly denied the defendant's motion for a new trial, as: (1) a challenged juror affirmed the guilty verdict; (2) details about a government witness's plea deal would not have changed the trial outcome; and (3) lab results confirming the purity of the contraband seized was sufficient to show that the substance defendant possessed was cocaine. *Tate v. State*, 278 Ga. App. 324, 628 S.E.2d 730 (2006).

Defendant's aggravated assault with a deadly weapon conviction was upheld, and an amended motion for a new trial was properly denied, as the defendant was

not entitled to a jury instruction on a claimed defense of “mere presence” as such was not a recognized defense, and the charge given to the jury covered all legal principles relevant to the determination of guilt; any confusion was cleared up by the court’s further instruction that in order for the jury to convict defendant of aggravated assault under a party to a crime theory, it would have to find that the defendant directly committed or intentionally helped in the commission of aggravated assault with a deadly weapon. *Kelley v. State*, 279 Ga. App. 187, 630 S.E.2d 783 (2006).

The trial court did not abuse the court’s discretion in denying the defendant’s extraordinary motion for new trial without a hearing as: (1) the alleged newly-discovered evidence was not so material that it would likely result in a different verdict; (2) the affidavits presented lacked the type of materiality required to support a new trial as they did not show the witnesses’s trial testimony to have been the purest fabrication; (3) the defendant failed to act diligently in presenting the affidavits alleged to have supported the motion; (4) the trial court favored the original testimony, and as such, could not disregard the jury’s verdict; and (5) the defendant failed to present the facts necessary to warrant a hearing on the motion. *Davis v. State*, 283 Ga. 438, 660 S.E.2d 354 (2008), cert.denied, mot. granted, 129 S. Ct. 397, 172 L.Ed.2d 323 (2008).

Trial court properly denied defendant’s motion for a new trial based on newly discovered evidence with regard to defendant’s convictions of child molestation and aggravated child molestation as a relative’s alleged statements admitting to the molestation served only to impeach the victim’s very specific trial testimony that defendant committed the molestation, and the victim’s alleged recantation also served only to impeach, and was not sufficient to constitute newly discovered evidence. Evidence that defendant had a sexually transmitted disease and that the victim would have that disease if defendant was the actual perpetrator also did not satisfy the requirement for newly discovered evidence as defendant was aware

at trial that defendant suffered from a genital malady and described the condition to jurors. *Adams v. State*, 290 Ga. App. 299, 659 S.E.2d 711 (2008).

Trial court did not abuse the court’s discretion in denying a temporary staffing agency’s motion for a new trial based on the failure of a widow and a hospital to spontaneously disclose their litigation agreement because there was nothing in the record to show that the agency’s ignorance of the litigation agreement rendered the trial fundamentally unfair; because the agency’s contractual obligation to indemnify the hospital for any damages the hospital had to pay on account of a nurse’s negligence, the hospital had an obvious incentive from the outset to try to show that the widow’s damages were entirely the nurse’s fault, rather than solely or partly the fault of the hospital’s own employee. *Med. Staffing Network, Inc. v. Connors*, 313 Ga. App. 645, 722 S.E.2d 370 (2012).

Authentication of evidence. — Trial court did not err in denying defendant’s motion for a new trial, pursuant to O.C.G.A. § 5-5-23, where defense counsel’s actions constituted trial strategy, were not shown to be ineffective, nor was there any showing that defense counsel’s conduct caused defendant any harm, which was a necessary element of showing ineffectiveness; the motion was also denied with respect to defendant’s claim that defendant had been coerced into helping commit the crimes, as a letter purportedly written by a co-defendant which corroborated the coercion defense was not authenticated, despite a request by the state for authentication, and there was no other evidence to support defendant’s claim. *Menefield v. State*, 264 Ga. App. 171, 590 S.E.2d 180 (2003).

Denial of motion proper. — Under O.C.G.A. § 5-5-23, denial of a motion for new trial was proper where the evidence was consistent with defendant’s pre-trial statement that was introduced at trial. *Mack v. State*, 263 Ga. App. 186, 587 S.E.2d 132 (2003).

Trial court did not abuse its discretion in denying defendant’s motion for a new trial based on a newly discovered confession from the victim, which had been lost

before trial; the victim testified that the confession had been signed under duress while the victim was chained and hanging by the victim's feet, and it was improbable that the confession would have produced a different verdict as, pretermittting whether the victim stole from the defendant, the defendant was not justified in binding the victim, hanging the victim from the victim's feet, and striking the victim. *McPetrie v. State*, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

Corporate defendant, in a negligence and product liability action, was not entitled to a new trial or judgment notwithstanding the verdict because the jury was properly charged that each individual tortfeasor's conduct did not have to constitute a substantial contributing factor in the plaintiff's injury in order to be considered a proximate cause thereof. *John Crane, Inc. v. Jones*, 278 Ga. 747, 604 S.E.2d 822 (2004).

Defendant's claim that a trial court improperly denied a motion for new trial and for extraordinary new trial, based on Brady violations by the state in failing to apprise defendant that a lab technician who had run tests on defendant's blood for the presence of alcohol had switched other test samples on two prior occasions, lacked merit; even if most of the elements of a Brady violation were shown, defendant was not deprived of a fair trial because there was no reasonable possibility that the outcome of the trial would have been different because blood taken by hospital personnel also indicated that alcohol was present. *Verlangieri v. State*, 273 Ga. App. 585, 615 S.E.2d 633 (2005).

Defendant's aggravated stalking conviction was upheld on appeal, and a new trial was properly denied, as sufficient evidence of the defendant's contact with the victim, in violation of a protective order, and acts of harassment and intimidation supported the same; moreover, the failure to object to the state's of similar transaction evidence waived any consideration of the same on appeal. *Kennedy v. State*, 279 Ga. App. 415, 631 S.E.2d 462 (2006).

Trial court properly denied a defendant's motion for a new trial based on newly discovered evidence with regard to the defendant's conviction for the murder

of the defendant's mother as the purported newly discovered evidence that another man with whom the defendant had used cocaine with on the day of the murder killed the defendant's mother after learning that the mother had a large sum of cash in the home in preparation for a trip, was part of the defendant's defense and was vigorously advanced at trial; the reviewing court found no error after concluding that the newly discovered evidence would not have reasonably produced a different result. *Hester v. State*, 282 Ga. 239, 647 S.E.2d 60 (2007).

A trial court properly denied defendants' motions to suppress and for new trial with regard to defendants' convictions for drug possession and trafficking based on obtaining allegedly new evidence that a stopping officer failed to run a computer check of one defendant's driver's license, as that officer had indicated, because there was no showing that defendants exercised due diligence in obtaining the additional evidence. In fact, the reason defense counsel provided for not obtaining the evidence sooner was a failure to believe that the computer check of the license was going to be a key issue. *Woodard v. State*, 289 Ga. App. 643, 658 S.E.2d 129 (2008), cert. denied, No. S08C1061, 2008 Ga. LEXIS 475 (Ga. 2008).

Trial court did not err in denying defendant's motion for new trial based on newly discovered evidence where bystander's existence was known by defense prior to trial; moreover, as the bystander's claim that defendant had no gun was contradicted by three bystanders and a victim, it did not appear that evidence would have produced a different verdict. *Banks v. State*, 290 Ga. App. 887, 660 S.E.2d 873 (2008).

Trial court did not err in denying the defendant's motion for new trial based on newly discovered evidence because the defendant failed to establish that the new evidence attacked the creditability of a witness; credibility is attacked by showing that the pending charges and their dismissal reveal a possible bias, prejudice, or ulterior motive on behalf of the witness to give untruthful or shaded testimony in an effort to please the state and not merely to testify in accordance with the State's the-

ory of the case. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Decision denying the defendant's motion for a new trial was proper, in light of the strength of the evidence that the defendant committed the charged offenses, including fingerprint evidence; it could not be concluded that new DNA evidence excluding the defendant as the donor of a semen sample recovered from a victim was so material that it warranted a new trial. *Wright v. State*, 310 Ga. App. 80, 712 S.E.2d 105 (2011).

Hearing of Motions Under Section

Failure to request an evidentiary hearing in support of a claim of ineffectiveness of trial counsel raised in a motion for new trial results only in a waiver of the right to such a hearing, but not in a waiver of appellate consideration of the claim. *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

Juror's alleged presence while co-defendant pleaded guilty. — Trial court properly denied defendant's motion for a new trial as the trial court's finding that defendant's jurors were not present when the co-defendant pleaded guilty was not clearly erroneous where the victims testified that: (1) they were present in the courtroom during the co-defendant's guilty plea; (2) they were familiar with and would have recognized the jurors se-

lected to hear defendant's case; and (3) no jurors selected to hear defendant's case were present in the courtroom during the co-defendant's guilty plea. *Alwin v. State*, 267 Ga. App. 236, 599 S.E.2d 216 (2004).

Defendant's competency no basis to conduct hearing or issue ruling on new trial motion. — Trial court erred by refusing to conduct a hearing or to rule on defendant's motion for a new trial based upon its finding that defendant was, at that time, mentally incompetent and unable to assist the counsel in challenging the conviction, as defendant's current mental incompetence provided no logical basis to delay a post-conviction proceeding to address whether defendant was incompetent at trial, whether the trial court should have been on notice of defendant's incompetency and conducted a hearing during trial, or whether the trial counsel was ineffective for failing to timely raise the competency issue. *Florescu v. State*, 276 Ga. App. 264, 623 S.E.2d 147 (2005).

Without a record of trial, the Court of Appeals was forced to be in accord with the presumption in favor of regularity of the trial court's denial of the motion, and assume that its findings were supported by sufficient competent evidence; thus, the findings made against the intervenor regarding the legitimization of a child he claimed to be the biological father of were upheld. *King v. Lusk*, 280 Ga. App. 40, 633 S.E.2d 350 (2006).

5-5-24. Error in instructions; objection required in civil cases; requested instructions; review of charges involving substantial error.

Law reviews. — For article, "Trial Practice and Procedure," see 53 *Mercer L. Rev.* 475 (2001). For annual survey of trial practice and procedure, see 58 *Mercer L. Rev.* 405 (2006). For survey article on

appellate practice and procedure, see 59 *Mercer L. Rev.* 21 (2007). For survey article on trial practice and procedure, see 59 *Mercer L. Rev.* 423 (2007).

JUDICIAL DECISIONS

ANALYSIS

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General Consideration

Explanatory comments. — Explanatory comments to juror question are not the same as a recharge and subsection (c) does not create an exception to a failure to object to such judicial comments. *Brown v. State*, 221 Ga. App. 454, 471 S.E.2d 527 (1996).

Statute is mandatory. — Provision in O.C.G.A. § 5-5-24(b) that the court shall instruct the jury after the arguments are completed is mandatory and requires a complete charge be given after closing arguments are completed. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Cited in *Brewton v. State*, 216 Ga. App. 346, 454 S.E.2d 558 (1995); *Sorrells v. Miller*, 218 Ga. App. 641, 462 S.E.2d 793 (1995); *Shilliday v. Dunaway*, 220 Ga. App. 406, 469 S.E.2d 485 (1996); *General Accident Ins. Co. v. Straws*, 220 Ga. App. 496, 472 S.E.2d 312 (1996); *Rhoden v. Department of Pub. Safety*, 221 Ga. App. 844, 473 S.E.2d 537 (1996); *Hawkins v. State*, 267 Ga. 124, 475 S.E.2d 625 (1996); *Bedeski v. Atlanta Coliseum, Inc.*, 224 Ga. App. 435, 480 S.E.2d 881 (1997); *Ford v. Saint Francis Hosp.*, 227 Ga. App. 823, 490 S.E.2d 415 (1997); *Trustees of Trinity College v. Ferris*, 228 Ga. App. 476, 491 S.E.2d 909 (1997); *Moody v. Dykes*, 269 Ga. 217, 496 S.E.2d 907 (1998); *DOT v. Cannady*, 230 Ga. App. 585, 497 S.E.2d 72 (1998); *Orr v. CSX Transp., Inc.*, 233 Ga. App. 530, 505 S.E.2d 45 (1998); *Medina v. State*, 234 Ga. App. 13, 505 S.E.2d 558 (1998); *Witty v.*

McNeal Agency, Inc., 239 Ga. App. 554, 521 S.E.2d 619 (1999); *Levine v. Choi*, 240 Ga. App. 384, 522 S.E.2d 673 (1999); *Conger v. State*, 245 Ga. App. 399, 537 S.E.2d 798 (2000); *Hammett v. State*, 246 Ga. App. 287, 539 S.E.2d 193 (2000); *Rogers v. State*, 247 Ga. App. 219, 543 S.E.2d 81 (2000); *Heston v. Lilly*, 248 Ga. App. 856, 546 S.E.2d 816 (2001); *Clark v. State*, 251 Ga. App. 715, 555 S.E.2d 88 (2001); *Colkitt v. State*, 251 Ga. App. 749, 555 S.E.2d 121 (2001); *Dorminey v. State*, 258 Ga. App. 307, 574 S.E.2d 380 (2002); *McConnell v. State*, 263 Ga. App. 686, 589 S.E.2d 271 (2003); *Wakefield v. State*, 261 Ga. App. 474, 583 S.E.2d 155 (2003); *Brown v. State*, 268 Ga. App. 629, 602 S.E.2d 158 (2004); *Stack-Thorp v. State*, 270 Ga. App. 796, 608 S.E.2d 289 (2004); *King v. Zakaria*, 280 Ga. App. 570, 634 S.E.2d 444 (2006); *Jones v. State*, 280 Ga. App. 287, 633 S.E.2d 806 (2006); *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007); *Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*, 288 Ga. App. 642, 655 S.E.2d 269 (2007); *Lewis v. Van Anda*, 282 Ga. 763, 653 S.E.2d 708 (2007); *Russell v. State*, 289 Ga. App. 789, 658 S.E.2d 400 (2008); *Coney v. State*, 290 Ga. App. 364, 659 S.E.2d 768 (2008); *Horton v. Hendrix*, 291 Ga. App. 416, 662 S.E.2d 227 (2008); *McKenzie v. State*, 284 Ga. 342, 667 S.E.2d 43 (2008); *Hobbs v. State*, 299 Ga. App. 521, 682 S.E.2d 697 (2009); *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010); *Doe v. State*, 306 Ga. App. 348, 702 S.E.2d 669 (2010).

Requested Instructions

1. In General

Request to charge must be in writing, etc.

In accord with *Dumas v. Stafford* and *Son*. See *Howard v. State*, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

Supplemental instructions. — Trial court did not violate O.C.G.A. § 5-5-24(b) in giving a charge on concurrent negligence after the close of evidence, as a conflict on the issue of concurrent negligence arose after the charge conference. *Swanson v. Hall*, 275 Ga. App. 452, 620 S.E.2d 576 (2005).

Ineffective assistance of counsel for failure to object not found. — Trial counsel was not ineffective for failing to object to the trial court's inclusion of a simple assault charge after the charge conference at which the trial court stated that the charge would not be given, in violation of O.C.G.A. § 5-5-24(b), as the jury found defendant guilty of simple assault on one of the aggravated assault charges, so defendant failed to show how the failure to object prejudiced defendant's defense. *Osterhout v. State*, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

2. Judge's Duty Regarding Proposed Action on Requested Charges

Court required to inform of proposed actions. — Subsection (b) requires a trial court to inform counsel of its proposed actions on requested charges prior to argument to the jury. *Jiles v. Peters*, 216 Ga. App. 288, 454 S.E.2d 178 (1995).

Subsection (b) does not require a judge to accede to a party's requested charges, but merely requires the judge to inform the parties as to his action on the requests prior to closing arguments, so as to allow the parties to argue their cases intelligently to the jury. *Wozniuk v. Kitchin*, 229 Ga. App. 359, 494 S.E.2d 247 (1997).

Failure to so inform, etc.

In accord with *Latimore v. State*. See *Roberts v. State*, 223 Ga. App. 167, 477 S.E.2d 345 (1996).

Prejudice must be shown to warrant reversal or new trial for noncom-

pliance with subsection (b).

There was no harmful error in the trial court's inclusion of a simple assault charge as a lesser included offense of aggravated assault after closing argument and after defendant's request for a simple assault charge was denied, in violation of O.C.G.A. § 5-5-24, as defendant did not bring the matter to the trial court's attention nor did defendant ask to reargue in light of the unexpectedly included charge. *Osterhout v. State*, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Judge's failure to file written requests with clerk not reversible error where no harm done, etc.

In accord with *Nelson v. Seaboard Coast Line R.R.* See *Adams v. State*, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

3. Application

Preliminary instructions. — Denial of defendant's request for the trial court to give suggested preliminary jury instructions at the commencement of trial was not an abuse of discretion. *Honeycutt v. State*, 245 Ga. App. 819, 538 S.E.2d 870 (2000).

Charge need not be in exact language requested.

Since a trial court's charge on accomplice testimony was virtually identical to the charge on accomplice testimony contained in the pattern jury instructions and specifically approved by the Supreme Court of Georgia, the defendant could not, as a matter of law, have shown that this charge was harmful. *Chapman v. State*, 279 Ga. App. 200, 630 S.E.2d 810 (2006).

Prior inconsistent statement. — Although the defendant's counsel failed to secure a transcript of the defendant's daughter's juvenile court proceeding, wherein the daughter claimed sole responsibility for having shoplifted various items from a store, it was not shown that such a transcript or a jury charge on the daughter's prior consistent statements would have caused the jury to reject the testimony of the store's asset protection agent that the agent observed the defendant tear packaging off items of merchandise in the shoplifting trial; accordingly, there was no ineffective assistance of the defendant's counsel in violation of the Sixth Amendment and Ga. Const. 1983,

Art. I, Sec. I, Para. XIV, and the failure of the trial court to have given the jury prior consistent statement jury instructions under O.C.G.A. § 5-5-24(b) was not harmful error. *Tucker v. State*, 282 Ga. App. 807, 640 S.E.2d 310 (2006).

Asserting error on appeal barred.

— Defendant's consent to reversal of the usual order of events, such that the jury was instructed before closing arguments were made, barred defendant from asserting error on appeal. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Trial court's alleged error in instructing the jury that it could consider the level of certainty shown by a witness about the witness's identification when addressing the reliability of identifications was waived since the defendant requested the instruction; because the defendant requested the instruction, substantial error review under O.C.G.A. § 5-5-24(c) was unavailable. *Brewer v. State*, 280 Ga. App. 582, 634 S.E.2d 534 (2006).

Jury Charge

1. In General

Perfection not required.

Jury charge that is "harmful as a matter of law" within the meaning of O.C.G.A. § 5-5-24(c) is one that is so blatantly apparent and prejudicial that it raises the question of whether the losing party has been deprived of a fair trial because of it, or a gross injustice has resulted that is directly attributable to the alleged error. *Mercker v. Abend*, 260 Ga. App. 836, 581 S.E.2d 351 (2003).

Preliminary instructions no substitute for complete jury instructions. — As a general rule, preliminary instructions given before evidence is presented cannot serve as a substitute for complete jury instructions required by this subsection after closing arguments are completed. *Massey v. State*, 270 Ga. 76, 508 S.E.2d 149 (1998).

Failure to charge on defense of misidentification. — When a trial court charged the jury fully on the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses, it is not error to fail to charge, *sua sponte*, on identifica-

tion. *Clay v. State*, 232 Ga. App. 656, 503 S.E.2d 560 (1998).

Failure to charge on witness identification not error. — Trial court did not err in failing to charge the jury on witness identification with regard to a defendant's trial for armed robbery and other crimes as the defendant never requested the charge and identification was not an issue since there was no eyewitness testimony that specifically identified the defendant as the perpetrator of the armed robbery or of the theft of the pickup truck. *Johnson v. State*, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

Requirements for charge if multiple defendants. — While it would have been better had a trial court explicitly told a jury to decide the guilt or innocence of each co-defendant separately, its instructions were not sufficiently prejudicial to deprive defendant of a fair trial, especially since defendant neither failed to request such an instruction nor made any objection to the trial court's charge. *Miller v. State*, 258 Ga. App. 322, 574 S.E.2d 392 (2002).

Charge on element of intent. — Trial court properly instructed the jury that, in order to convict defendant, a finding of intent was required; then, the trial court differentiated the types of intent involved and read the elements of each crime directly from the statutes for the jury's consideration and thus, as a whole, the jury instructions appropriately enabled the jury to judiciously determine the guilt or innocence of defendant. *Williams v. State*, 252 Ga. App. 280, 556 S.E.2d 170 (2001).

No objectionable summary of reasonable doubt standard. — Trial court correctly charged the jury as to the rape count of the indictment and its lesser included offenses and properly instructed the jury as to the state's burden to prove the defendant's guilt beyond a reasonable doubt, substantially in accordance with the pattern charge because there was no objectionable summary of the reasonable doubt standard as an honest belief, and while the best practice would not have been to employ the word "believe" in the court's charge, the trial court did not improperly summarize the burden of proof or

otherwise confuse the jury in doing so; the trial court made no attempt to summarize the court's reasonable doubt charge as an honestly held belief or to otherwise explain the charge, and twice after giving the charge, the trial court made reference to the court's reasonable doubt charge as initially given by instructing the jury that the jury could convict the defendant of rape and child molestation if the jury believed beyond a reasonable doubt that the defendant was guilty thereof. *Alexander v. State*, 308 Ga. App. 245, 707 S.E.2d 156 (2011).

2. Recharge and Correction of Erroneous Charge

Correction of erroneous charge.

Trial court did not err in denying the defendant's motion for mistrial because it was within the trial court's discretion to decide whether a mistrial was the only corrective measure or whether any prejudicial effect of a jury instruction handout error could otherwise be corrected; the trial court did not abuse the court's discretion in determining that any prejudicial effect could be adequately addressed by remedial instructions, together with a correct copy of the jury charge, such that a mistrial was not the only corrective measure that would preserve defendant's right to a fair trial, and the charge as a whole, including the remedial actions taken by the trial court, was not likely to confuse the jury. *Britton v. State*, 310 Ga. App. 742, 713 S.E.2d 914 (2011).

The purpose of subsection (a) is to allow correction of errors in the charge when there is still time to do so. *Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 532 S.E.2d 159 (2000).

No error in recharge. — Because the jury in defendant's criminal matter requested clarification for purposes of their deliberations, whereupon the trial court recharged them on the offense of aggravated assault, in violation of O.C.G.A. § 16-5-21, such was not error under O.C.G.A. § 5-5-24(c) or under the holding in *Dukes*, as the initial charge and the recharge were not based on the entire aggravated assault statute but instead, were only based on that part of the O.C.G.A. § 16-5-21 that related to the

allegations in the indictment. *Johnson v. State*, 279 Ga. App. 669, 632 S.E.2d 688 (2006).

No error in failure to recharge. — Trial court's error in failing to comply with O.C.G.A. § 5-5-24(b) was harmless given the strength of the evidence of the defendant's guilt, and given that the jury deliberated the same day that the jury were given the instructions as to the presumption of innocence and reasonable doubt; it was highly probable that the trial court's failure to repeat the instructions as to the presumption of innocence and reasonable doubt in the final charge did not contribute to the verdict because the trial court charged the jury on the principles of reasonable doubt and the presumption of innocence in the preliminary charge, referred the jury back to those instructions in the jury's final charge, and the court did so in the context of a one-day trial. *Tidwell v. State*, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

3. Application

Preliminary charges on presumption of innocence and other issues not required. — Defendant's trial counsel was not ineffective in failing to request that the trial court give preliminary instructions regarding the presumption of innocence, reasonable doubt, or the burden of proof because these doctrines were presented in the trial court's charge at the close of evidence as required by O.C.G.A. § 5-5-24(b). *Decapite v. State*, 312 Ga. App. 832, 720 S.E.2d 297 (2011).

Charge on damages. — Instruction that the only issue was the amount of damages, if any, and the jury could find from "absolutely nothing to anything" was not error because there was some evidence that plaintiff suffered no damages as a result of the accident. *Wright v. Barnes*, 240 Ga. App. 684, 524 S.E.2d 758 (1999).

Failure to object to a jury charge in a criminal case constituted a waiver except where there had been a substantial error in the charge which was harmful as a matter of law. *Jones v. State*, 252 Ga. App. 332, 556 S.E.2d 238 (2001).

Because the defendant failed to object to

the trial court's jury charge on aggravated stalking or reserve exceptions to the charge, the defendant waived the claim for appellate review; the trial court's instruction that "the existence of a written order is presumptive evidence of notice to the defendant" was not harmful as a matter of law. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Failure to object to a jury charge in a civil case constituted a waiver. — Passenger waived any error in the trial court's charge to the jury on the duty of a guest passenger with respect to the negligence of the driver because it was an incomplete statement of the law as the passenger failed to object to the charge below; under O.C.G.A. § 5-5-24(a), the appellate court could not consider the claim for the first time on appeal. *McCannon v. Wilson*, 267 Ga. App. 815, 600 S.E.2d 796 (2004).

Failure to object to jury charge in probate court proceeding. — As to the use of the term "lunatic" in a probate court's jury instructions in a will contest case, the relatives made no objection to it at the conclusion of the probate court's instruction; therefore, they were not permitted to complain of it on appeal. This was not a situation in which review is warranted pursuant to O.C.G.A. § 5-5-24(c). *Kersey v. Williamson*, 284 Ga. 660, 670 S.E.2d 405 (2008).

Failure to charge on presumption of innocence. — Trial court's failure to properly charge the jury after closing arguments on the presumption of innocence, burden of proof and the standard of proof was reversible error. The error was not harmless because the jury was presented with conflicting testimony and the eyewitness was an informant whose identity was not revealed to defendant. *Little v. State*, 230 Ga. App. 803, 498 S.E.2d 284 (1998).

Failure of charge to indicate which of several counts may support punitive damages.

In plaintiff patient's medical malpractice suit against defendants, a doctor and the doctor's professional corporation, the trial court did not err in refusing to give the patient's requested jury charge that a patient was entitled to believe and rely

upon the affirmative representations of the patient's doctor, and that, while under the doctor's care, the patient had no duty to investigate or confirm the truth or accuracy of the doctor's representations, as: (1) the patient failed to show how the charge was relevant in relation to the disputed issue of whether the doctor was negligent in failing to refer the patient to a specialist; and (2) the charge was not required even if, as the patient contended, the patient's credibility was at issue, because the trial court adequately charged the jury on credibility. *Mercker v. Abend*, 260 Ga. App. 836, 581 S.E.2d 351 (2003).

New trial not warranted since jury charge in medical malpractice case proper. — New trial was not warranted in a widow's action against a medical practice, alleging multiple claims that arose from her husband's death following cardiac surgery by the practice, as there was no error in the trial court's jury instructions on the standard of care that applied to the health care professionals, which included the doctors and nurses. *Sagon v. Peachtree Cardiovascular & Thoracic Surgs., P.A.*, 297 Ga. App. 379, 677 S.E.2d 351 (2009).

Instruction on rules of road. — There was no substantial error in the jury charge where even though a certified copy of the driver's guilty plea to driving on the wrong side of the road was entered in evidence, it was not an admission of liability, and the injured person still had to establish the driver's negligence, causation, and damages; thus, there was no injustice in instructing on the rules of road, and where the administrator for the driver's estate failed to object to said charges, the administrator was not entitled to relief under the substantial error rule. *Setliff v. Littleton*, 264 Ga. App. 711, 592 S.E.2d 180 (2003).

Negligent hiring, retention, and entrapment instruction. — In an action arising from a collision between an automobile driver and a truck driver, the jury's punitive damages verdict against the employer of the truck driver was improper as the employer could not be vicariously liable when the truck driver had been discharged from personal liability because

the automobile driver failed to request instructions to charge on negligent hiring, retention, and entrustment and failed to object on the instructions given under O.C.G.A. § 5-5-24(a). *Am. Material Servs. v. Giddens*, 296 Ga. App. 643, 675 S.E.2d 540 (2009).

Charge on retreat required when defendant claimed self-defense. —

Trial court erred in failing to charge a jury on the principles of retreat even though the request for the instruction was made orally because self-defense was the defendant's sole defense, the prosecution placed the concept of retreat in issue during cross-examination of the defendant, and evidence of the defendant's guilt on charges that included aggravated assault was not overwhelming. *Felder v. State*, 291 Ga. App. 740, 662 S.E.2d 826 (2008).

Failure to object to jury instruction regarding damages. — Although the condemnee contended that the trial court erred in failing to inform the jury that the jury could consider the right to cure as a part of consequential damages, the court was correct in explaining to trial counsel that evidence of damage to property as a result of a taking, as represented by a cost to cure, may be considered a factor in establishing the reduced fair market value of the remaining property after the taking although the cost to cure may not be recovered as a separate element of damage; although the trial court instructed the jury that the cost to cure may not be recovered as a separate element of damage, it did not inform the jury that the cost to cure could be a factor in establishing the reduced fair market value of the remaining property after the taking. But the condemnee did not take advantage of the opportunity provided by the court to have the condemnee's expert clarify cost to cure for the jury, and the condemnee waived any claim of error because the condemnee made no objection following the court's instruction. Moreover, the appellate court found no substantial error in the court's instruction that was harmful as a matter of law in light of the court's charge to the jury at the end of trial concerning consequential damages. *RNW Family P'ship, Ltd. v. DOT*, 307 Ga. App. 108, 704 S.E.2d 211 (2010).

4. Harmless Error

Charging an entire statute when only part is applicable.

Trial court's instruction of the jury on the entirety of O.C.G.A. § 16-6-4(c) when the aggravated child molestation charge was based on physical injury to a child was not a substantial error under O.C.G.A. § 5-5-24(c); the indictment was read to the jury, the indictment was sent with the jury for deliberations, and the jury was instructed that the state's burden was to prove every material allegation in the indictment and every essential element of each crime beyond a reasonable doubt. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Failure to give an unrequested charge on circumstantial and secondary evidence was not error where the state's case depended primarily on the victim's testimony which was not circumstantial, and the trial court gave an instruction regarding reliance on circumstantial evidence. *Nobles v. State*, 233 Ga. App. 63, 503 S.E.2d 321 (1998).

Failure to charge on duty to retreat where defendant argues self-defense.

— Based on the overwhelming evidence of guilt of a charge of aggravated assault, the trial court's failure to sua sponte give a jury instruction on the duty to retreat was not harmful, and thus the issue was not reviewable under O.C.G.A. § 5-5-24; the only evidence that the defendant acted in self-defense was the defendant's own testimony and, as the jury saw a videotape of the altercation, it did not have to speculate on how the stabbing occurred. *Buggle v. State*, 299 Ga. App. 515, 683 S.E.2d 85 (2009).

Failure to charge on accident and justification. —

In a prosecution for driving under the influence and making an improper lane change, because the defendant did not request instructions on accident and justification, the trial court did not err in failing to give them; moreover, because the jury was charged on involuntary intoxication, the failure to charge on accident was not harmful as a matter of law. *Walker v. State*, 280 Ga. App. 393, 634 S.E.2d 177 (2006).

Failure to charge knowledge of defendant prosecution for aggravated assault. — In a prosecution for aggravated assault, it was harmless error for the court not to charge that the defendant had knowledge that the persons assaulted were police officers where the defendant testified that defendant knew they were police officers and that he called 911 to summon them to the scene. *Stevenson v. State*, 234 Ga. App. 103, 506 S.E.2d 226 (1998).

In a prosecution for aggravated assault upon a police officer, failing to charge the jury expressly that an essential element of the offense is the defendant's knowledge that the victim was a police officer was harmless error because defendant's testimony showed clearly that he knew the man was a police officer. *Priester v. State*, 249 Ga. App. 594, 549 S.E.2d 429 (2001).

Charging the wrong Code section in a criminal action did not result in substantial harm where there was no reasonable probability that defendant was convicted of committing the offense in a manner not charged in the indictment. *Miller v. State*, 240 Ga. App. 18, 522 S.E.2d 519 (1999).

"Level of certainty" charge. — There was no harmful error under O.C.G.A. § 5-5-24 in the giving of a "level of certainty" eyewitness identification testimony instruction; the identification of the defendant by two officers was highly reliable under the totality of factors mentioned in the instruction, and only one officer had been asked about the certainty of the officer's identification. *Olivaria v. State*, 286 Ga. App. 856, 650 S.E.2d 422 (2007).

Civil conspiracy charge not harmful as a matter of law. — Trial court's instructing the jury on civil conspiracy was not harmful to the defendant as a matter of law because, to the extent that the plaintiff alleged that the defendant directly or indirectly through its doctors maliciously undertook actions aimed at destroying plaintiff's medical practice, plaintiff asserted a theory against the defendant that was cognizable regardless of the existence of a conspiracy. *Alta Anesthesia Assocs. of Ga., PC v. Gibbons*, 245 Ga. App. 79, 537 S.E.2d 388 (2000).

Instruction regarding sufficiency of evidence in civil matter. — In an action against the Georgia Department of Transportation alleging negligent placement of safety devices at an intersection, the trial court erred by instructing the jury that other collision evidence alone was not sufficient to show notice of a dangerous condition, but the error was harmless. *McCorkle v. DOT*, 257 Ga. App. 397, 571 S.E.2d 160 (2002).

Misstatement of limitation period. — Even though the trial court erred in charging the jury that the statute of limitations for incest is seven years, the error was harmless because defendant's acts of incest occurred well within the applicable four-year limitation period. *Wiser v. State*, 242 Ga. App. 593, 530 S.E.2d 278 (2000).

Misstatement in jury charge harmless. — In a nuisance suit brought by homeowners against a city, any error in a charge referring to "owner or occupier" rather than "owner and occupier" was harmless; the city had not excepted to the charge on this ground, and the city had not shown that there were any homeowners who were not both owners and occupants of their homes. *City of Atlanta v. Broadnax*, 285 Ga. App. 430, 646 S.E.2d 279 (2007), cert. denied, 2007 Ga. LEXIS 615, 648 (Ga. 2007).

Insurance coverage. — Although failure to have proof of insurance coverage in violation of O.C.G.A. § 40-6-10(a)(1) and driving without liability insurance in violation of O.C.G.A. § 40-6-10(b) are separate offenses, reversal was not mandated despite the fact that the trial court incorrectly instructed the jury because trial counsel failed to object or raise exceptions to the jury instructions as required by O.C.G.A. § 5-5-24(c) and there was no finding that there was a substantial error which was harmful as a matter of law. *Augustin v. State*, 260 Ga. App. 631, 580 S.E.2d 640 (2003).

6. New Trial for Erroneous Charges

New trial warranted on Georgia RICO claims due to improper jury charge on standard of proof. — Trial court erred in a bifurcated suit asserting a claim of illegal insurance sales under the Georgia Racketeer Influenced and Cor-

rupt Organizations Act (Georgia RICO), O.C.G.A. § 16-14-1 et seq., by instructing the jury that the suing passenger of a cab was required to prove the asserted Georgia RICO claims against two cab companies by clear and convincing evidence as the proper standard of proof to have been applied was a preponderance of the evidence. *Am. Ass'n of Cab Cos. v. Parham*, 291 Ga. App. 33, 661 S.E.2d 161 (2008), cert. denied, 2008 Ga. LEXIS 690, 728 (Ga. 2008).

Improper charge on presumption of innocence. — Habeas corpus relief in the form of a new trial was properly granted to an inmate from a malice murder conviction based on an erroneous instruction on the presumption of innocence in spite of a correct instruction on the presumption that was given during preliminary instructions to the jury prior to the presentation of any evidence; such preliminary instructions could not serve as a substitute for the complete jury instructions required by O.C.G.A. § 5-5-24(b) after closing arguments were completed, and the omission of comprehensive instructions that were relevant and necessary to weigh the evidence and enable the jury to discharge its duty constituted plain error under O.C.G.A. § 5-5-24(c). *Tillman v. Massey*, 281 Ga. 291, 637 S.E.2d 720 (2006).

Allen charge not fatally defective. — Allen charge was not fatally defective because, although the Allen charge contained some inaccurate language, the fact that the jury spent less than an hour deliberating after the charge was given did not prove coercion; it was not an abuse of discretion to deny defendant's motion for a new trial as it was just as likely that the jury reached a verdict quickly after the Allen charge due to a fresh perspective after a night away from deliberations. *Graham v. State*, 273 Ga. App. 187, 614 S.E.2d 815 (2005).

DUI charge improper. — Jury charge that a DUI defendant's refusal to submit to a blood alcohol test could create an inference that the test would show the presence of alcohol which impaired the driver's driving was plain error, requiring a new trial, because the charge shifted the burden of proof to the defendant, requir-

ing the defendant to rebut the inference that the defendant was an impaired driver. *Wagner v. State*, 311 Ga. App. 589, 716 S.E.2d 633 (2011).

Giving of pattern jury instruction on comparative negligence not harmless error. — Trial court erred in charging the jury with the pattern instruction on comparative negligence because the instruction had been superseded by O.C.G.A. § 15-12-33(a), as amended in the Tort Reform Act of 2005; a van driver preserved the objections to the erroneous jury instruction and verdict form, and given the possibility that the jury could have found negligence on the part of the car driver but failed to quantify that driver's negligence in precise terms and reduce the jury's award of damages accordingly, the errors were not harmless. *Clark v. Rush*, 312 Ga. App. 333, 718 S.E.2d 555 (2011).

Objections to Charge or Failure to Charge

1. In General

Duty on counsel, etc.

In accord with *Turner v. Taylor*. See *Tice v. Cole*, 246 Ga. App. 135, 537 S.E.2d 713 (2000).

Failure to except to charge constitutes waiver.

The failure to object to a jury instruction generally constitutes a waiver of any defects in the charge, absent a substantial error blatantly apparent and prejudicial, resulting in a gross miscarriage of justice, but even the review of a substantial error under O.C.G.A. § 5-5-24(c) is not available when the giving of an instruction, or the failure to give an instruction, is induced during trial by counsel for the complaining party or specifically acquiesced in by counsel. *Queen v. Lambert*, 259 Ga. App. 385, 577 S.E.2d 72 (2003).

Defendant waived appellate review of a jury charge because defendant did not object nor reserve objections to the instruction when the court asked for any objections to the jury charge; in fact, defendant made a specific request for and acquiesced in the contested charge. *Courrier v. State*, 270 Ga. App. 622, 607 S.E.2d 221 (2004).

In a nuisance suit wherein the plaintiff homeowners received a verdict in their favor as against the City of Atlanta with regard to recurrent flooding in a neighborhood, because the city failed to object in any manner to the jury instruction on damages, any alleged error was harmless since the city failed to make any exception to the instruction. *City of Atlanta v. Broadnax*, 285 Ga. App. 430, 646 S.E.2d 279 (2007), cert. denied, 2007 Ga. LEXIS 615, 648 (Ga. 2007).

Errors harmful as a matter of law.

— Appellate court was entitled to consider whether a substantial error in a jury charge was harmful as a matter of law, regardless of whether or not defendant objected to the jury charge in the trial court. The trial court's failure to charge the jury on defendant's sole issue of self defense in defendant's felony obstruction of an officer case involved substantial error that was harmful as a matter of law, even though defendant did not object, as some evidence supported giving the instruction and the failure to give it was the equivalent of directing a verdict against defendant. *Watts v. State*, 259 Ga. App. 531, 578 S.E.2d 231 (2003).

Objections waived when counsel states he has no exceptions.

Where the trial court specifically asked for exceptions to the charge and defense counsel neither objected nor reserved exceptions for post-conviction review, defendant's claims of error regarding the jury charge were thus waived. *Leggon v. State*, 249 Ga. App. 467, 549 S.E.2d 137 (2001).

Failure to object to charge, etc.

Building purchaser's claim that the trial court erred by not giving a jury instruction that an incidental breach of a contract did not warrant rescission was deemed waived pursuant to O.C.G.A. § 5-5-24(a) and (c) after the purchaser failed to object to the failure to give the charge at the trial court level, and the purchaser did not show that it was a substantial error that was so harmful that it was within the exception to making an objection; the record revealed that the seller had insisted that the purchaser provide workers' compensation prior to beginning a salvage operation and when the purchaser did not, the seller barred the

purchaser's workers from further work, which was a valid act based on the parties' agreement and the substantial nature of the compensation condition to the contract. *Lawrence v. Bland*, 259 Ga. App. 366, 577 S.E.2d 64 (2003).

Where partnership failed to object to the trial court's charge instructing the jury on a cause of action for an accounting before the return of the jury's verdict, the claim of error was waived on appeal. *Singleton v. Terry*, 262 Ga. App. 151, 584 S.E.2d 613 (2003).

In a will dispute, because the appellants had not objected during the trial to the content of a jury charge, the trial court's conversation with the jury during a charge, or to an expert's opinion, these issues were not preserved for appellate review. *Lillard v. Owens*, 281 Ga. 619, 641 S.E.2d 511 (2007).

Any challenge to the jury instructions was waived for purposes of appellate review because trial counsel failed to object at trial to any portion of the jury instructions or to reserve the right to object later. *Loadholt v. State*, 286 Ga. 402, 687 S.E.2d 824 (2010).

Objections to pre-evidentiary statement.

— Reservation of objections to the main charge does not encompass objections to the pre-evidentiary statement since, while this section relieves defendant of the responsibility of objecting to jury charges at the time of trial and allows reservation of objections for a motion for new trial or appeal, it only concerns the charge given the jury at the end of the case. *Malone v. State*, 219 Ga. App. 728, 466 S.E.2d 645 (1995).

Failure to answer jury question.

Trial court did not abuse the court's discretion in charging the jury on the definitions of a firearm and a weapon in response to the jury's question regarding the offense of hijacking a motor vehicle because those terms were included within the definition of hijacking a motor vehicle. *Smith v. State*, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

Absence of the trial judge from the courtroom while the parties placed their objections on the record defeated a primary purpose of the requirement which is to ensure that the judge is afforded an

opportunity to determine if charging error in fact has occurred and to correct any error in the instructions prior to verdict so that the necessity of an appeal will be obviated; the purpose is not simply to "perfect the record" for appeal. *Crotts Enters., Inc. v. John Payne Co.*, 219 Ga. App. 173, 464 S.E.2d 844 (1995).

Failure to object to charge in bifurcated trial. — Although the defendant failed to object to the trial court's practice in the second phase of a bifurcated trial and failed to request that the trial court repeat its instructions on reasonable doubt, presumption of evidence, and other general principles of law that the trial court had charged at the end of the first phase of the trial, the trial court erred in failing to give those instructions, which protect a defendant's constitutional rights; however, the error was harmless as the jury had received the trial court's full instructions after arguments in the first phase of the trial and then, only three hours later, the jury began deliberations in the second phase of the trial. *McKenye v. State*, 247 Ga. App. 536, 544 S.E.2d 490 (2001), overruled on other grounds, *Wallace v. State*, 879 Ga. 275, 572 S.E.2d 579 (2002).

Preservation for review. — When a party failed to ask to reargue the facts in light of an instruction, any error attributable to the court's having surprised counsel with an instruction that counsel believed had been withdrawn was not preserved for appellate review; as counsel had excepted to the instruction on the record before the jury returned its verdict, however, the appropriateness of the instruction itself had been preserved for review. *White v. Scott*, 284 Ga. App. 87, 643 S.E.2d 356 (2007).

2. Time for Objection

Objection to be made before jury returns verdict, etc.

In accord with *DOT v. Old Nat'l Inn, Inc.* See *Arvida/JMB Partners v. Hadaway*, 227 Ga. App. 335, 489 S.E.2d 125 (1997).

Plaintiff waived objection to the charge to the jury on breach of contract or fraud because plaintiff failed to except to the charge before the verdict. *Smithson v.*

Parker, 242 Ga. App. 133, 528 S.E.2d 886 (2000).

Doctor and doctor's employer timely objected to trial court giving a jury charge that was erroneous because it instructed the jury on the loss of past and future wages as an element of damages and gave the jury specific guidelines on calculating such damages even though the patient disclaimed such damages and presented no evidence on those elements of damages, as their objection which was lodged before the jury returned its verdict was timely under Georgia statutory law. *Schriever v. Maddox*, 259 Ga. App. 558, 578 S.E.2d 210 (2003).

In a suit by homeowners for breach of an exclusive listing contract, when the homeowner's claimed on appeal that the trial court did not properly instruct the jury on the issue of attorney fees, to the extent that the homeowners did not raise this objection in the trial court, their objection was waived, under O.C.G.A. § 5-5-24(a). *West v. Austin*, 274 Ga. App. 729, 618 S.E.2d 662 (2005).

Failure to except before verdict generally results in waiver of any defects in charge.

Individual waived any error in charging the jury on O.C.G.A. § 53-4-30 as the individual failed to object when the charge was given and there was no error in giving the instruction within the meaning of O.C.G.A. § 5-5-24(c). *Jackson v. Neese*, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

3. Form and Content of Objection

Record should contain reasons for requested charge. — The grounds of objection, i.e. the reasons urged for the requested charge, should be placed somewhere on the record, although all that is needed after the charge is a perfunctory objection identifying the omitted requested charge; and while the record need not be made with any particular formality, enough should appear so that the reviewing court can ascertain the grounds urged below. *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001), *aff'd*, 275 Ga. 145, 563 S.E.2d 116 (2002), cert. denied, 537 U.S. 886, 123 S. Ct. 32, 154 L. Ed. 2d 146 (2002).

Objections should be sufficiently specific, etc.

An objection to the failure to give a charge was insufficient where the objection consisted of simply listing the charge not given, without any statement of grounds. *Mays v. Farah U.S.A., Inc.*, 236 Ga. App. 1, 510 S.E.2d 868 (1999); *Adams v. Metropolitan Atlanta Rapid Transit Auth.*, 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Objection stating that “I object to every charge that I tendered for you to consider that you didn’t give” was insufficient. *Evans Toyota, Inc. v. Cronic*, 233 Ga. App. 318, 503 S.E.2d 358 (1998).

The plaintiffs in a personal injury case had preserved their objection to a jury recharge for review when their counsel objected on the grounds that the recharge was confusing, misleading, and contrary to the law, and the plaintiffs were not required to submit an alternate charge; the plaintiffs’ objection clearly identified the paragraph of the recharge to which they were excepting and specified that the recharge was being challenged because it was contrary to Georgia law, and that was all the law required to preserve an objection for appeal. *Pearson v. Tippmann Pneumatics, Inc.*, 281 Ga. 740, 642 S.E.2d 691 (2007).

Objection must be written, state grounds, and be made before jury returns verdict.

Where an appellant did not state distinctly the matter to which it objected after the jury had been charged, and the grounds of the objection, there was nothing for the court to review. *Alpha Beta Dickerson Southeastern, Inc. v. White Co.*, 235 Ga. App. 273, 509 S.E.2d 351 (1998).

Writing required. — Where defendant’s counsel only orally requested a jury charge on reckless conduct as a lesser-included offense of aggravated assault, the charge request was properly denied because under O.C.G.A. § 5-5-24(b) it was required to have been made in writing. *Shinholster v. State*, 262 Ga. App. 802, 586 S.E.2d 708 (2003).

Inadequate objection to jury charge. — Counsel’s objection to a jury charge prior to the charge and then counsel’s noting that counsel had excepted to

the charge after the charge was given was an inadequate objection to the charge as given, pursuant to O.C.G.A. § 5-5-24(a), and did not preserve the alleged error for appeal. *McDowell v. Hartzog*, 312 Ga. App. 162, 718 S.E.2d 20 (2011).

4. Application

Proximate cause. — The court’s failure to define the term “proximate cause” did not result in such a gross injustice as to raise a question of whether the defendant was denied a fair trial as the case did not involve evidence of multiple, intervening, or superseding causes or other factors that can render proximate cause an elusive concept where the jury was presented with evidence that the defendant negligently caused the automobile collision and that the plaintiff sustained back injuries. *Gray v. Elias*, 236 Ga. App. 799, 513 S.E.2d 539 (1999).

Trial court’s charge containing the legal meaning of proximate cause and its application to the facts was not error, even though the legal definition submitted by plaintiff would have been elaborative and it would have been better had the court given this or some other definition of proximate cause. *Hancock v. Bryan County Bd. of Educ.*, 240 Ga. App. 622, 522 S.E.2d 661 (1999).

Failure to object to reasonable doubt instruction.

Even though a criminal defendant waived objections to a reasonable doubt instruction by failing to preserve them after direct inquiry by the court, the issue concerning the language of the instruction would be considered on appeal since proof beyond a reasonable doubt is the “true question” involved in a criminal trial. In accord with *Tyson v. State*. See *Loyd v. State*, 222 Ga. App. 193, 474 S.E.2d 96 (1996).

Failure to request charge on foreseeability. — After the defendant failed to request a jury instruction on foreseeability in a criminal trial, the trial court’s failure to give such an instruction was not clearly harmful and erroneous as a matter of law under O.C.G.A. § 5-5-24(b); the trial court gave the complete pattern instruction on felony murder, as well as all other theories applicable

to the evidence. *Shepherd v. State*, 280 Ga. 245, 626 S.E.2d 96 (2006).

Failure to object to absence of requested charges.

Because an appellant readily admitted that it failed to request charges on circumstantial evidence and speculative damages and did not object to the charge given by the trial court, the appeals court refused to hold that the trial court's failure to give the charges, *sua sponte*, created such a gross injustice as to deprive the appellant of a fair trial. *Cnty. Bank v. Handy Auto Parts, Inc.*, 270 Ga. App. 640, 607 S.E.2d 241 (2004).

Since defense counsel did not object to instructing the jury before closing arguments, no error was preserved for appeal. *Bennett v. State*, 279 Ga. App. 371, 631 S.E.2d 402 (2006).

Spouse in wrongful death complaint failed to preserve for appellate review the spouse's challenge to a trial court's failure to give an instruction to the jury as the spouse failed to object to the trial court's refusal to give the jury several instructions regarding how an employee's use of a cell phone related to determining whether the employee was acting within the scope of the employee's employment at a particular time. *Wood v. B&S Enters.*, 314 Ga. App. 128, 723 S.E.2d 443 (2012).

Failure to object to preliminary instructions. — Defendant could not acquiesce in trial court's preliminary statement and complain of it for the first time on appeal under O.C.G.A. § 5-5-24. The trial court's preliminary instruction properly informed the jury that under Ga. Const. art. I, § I, para. XI(a): (1) it was absolutely and exclusively the judge of the facts in the case; (2) it was, in this sense only, the judge of the law; (3) it was the province of the court to construe the law and give it in the charge; and (4) it was the province of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict. *Whitehead v. State*, 258 Ga. App. 271, 574 S.E.2d 351 (2002).

Failure to charge on necessity of corroboration with accomplice's testimony. — Where the state does not rely solely upon an accomplice's testimony to

connect the defendant to the crime, no error occurs when the trial court fails to *sua sponte* charge the jury as to the necessity for corroboration. *Palmer v. State*, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. 2007).

Failure to participate in proposed charge conference.

Although plaintiff patient argued that the trial court erred in injecting the phrase "reasonable degree of medical certainty" into the jury charge on the standard of proof for proximate cause of injury in the patient's medical malpractice suit, any claim of error regarding the instruction was waived because, after raising the issue in the trial court, the patient's counsel expressly acquiesced in the trial court's position that the offending language had been effectively stricken and was not before the jury; even the review of substantial error under O.C.G.A. § 5-5-24(c) is not available when the giving of an instruction is specifically acquiesced in by counsel. *Mercker v. Abend*, 260 Ga. App. 836, 581 S.E.2d 351 (2003).

Defendant was properly denied a new trial because the trial court did not err in failing to charge a jury on impeachment of a witness by a prior conviction of a crime of moral turpitude where defendant did not enter a written request for the charge but in fact expressly agreed that it was not needed and in light of the overwhelming evidence of defendant's guilt. *Holt v. State*, 260 Ga. App. 826, 581 S.E.2d 257 (2003).

Failure to object to failing to define clear and convincing evidence. — Because an owner and its agent did not object to the trial court's failure to give a certain jury instruction, because their liability had already been established as a matter of law by way of their default, and because they failed to show harm resulting from the trial court's failure to define the clear and convincing evidence standard in O.C.G.A. § 51-12-5.1(b), they failed to preserve their claims on appeal in accordance with O.C.G.A. § 5-5-24(a). *Waller v. Rymer*, 293 Ga. App. 833, 668 S.E.2d 470 (2008).

Substantial Error as a Matter of Law

1. In General

Appellant must have been deprived of fair trial.

Trial court did not commit harmful error under O.C.G.A. § 5-5-24(c) in failing to charge the jury that an engineering firm had the burden of proof as to its affirmative defenses of contributory and comparative negligence; any error did not result in a gross injustice, such as to raise a question as to whether a developer was deprived of a fair trial. *Prime Retail Dev., Inc. v. Marbury Eng'g Co.*, 270 Ga. App. 548, 608 S.E.2d 534 (2004).

2. Application

Types of erroneous charges that justify reversal although no objection made.

Trial court properly did not instruct the jury, *sua sponte* under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons defendant was prevented from completing the jobs, and that the defendant had composed a list with defendant's pastor of how much work was done on each job, and how much defendant owed the people. *Stratacos v. State*, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Interpretation of words "substantial error ... harmful as a matter of law", etc.

When, in a murder prosecution, the trial court erroneously charged the jury that it could infer defendant's intent to kill the victim from defendant's use of a deadly weapon, but defendant did not object to this charge, the charge was not a "substantial error," within the meaning of O.C.G.A. § 5-5-24(c), and it was subject to typical waiver rules, so defendant's failure to object at trial waived the issue on appeal. *Morgan v. State*, 279 Ga. 6, 608 S.E.2d 619 (2005).

Unconstitutional to convict defendant of unindicted charge. — Where a

reasonable probability existed that the jury convicted the defendant of a firearms charge in a manner not charged in the indictment (through burglary, rather than during an aggravated assault), the error violated the defendant's due process rights and was sufficiently egregious to preclude a finding that it was waived. *Levin v. State*, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Failure to give a charge on criminal defendant's sole defense, even without a request, constitutes reversible error if there is some evidence to support the charge. *Moore v. State*, 246 Ga. App. 163, 539 S.E.2d 851 (2000).

"Deadly force" instruction given when police prosecuted. — In a prosecution against police officers for manslaughter, arising out of the shooting of the victim in a parking lot following a report that he had threatened someone with a knife, the justification charge given was wholly inadequate, as it applied to ordinary citizens, not to law enforcement officers acting in the line of duty, who are allowed to use deadly force on the reasonable belief that the suspect possesses a deadly weapon. Because this omission was harmful as a matter of law, the case was reversed, notwithstanding the fact that the charge was verbally requested after the jury began deliberating. *Robinson v. State*, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Charge must be necessarily harmful to complaining party, etc.

In accord with *Moon v. Kimberly*. See *Allstate Ins. Co. v. Justice*, 229 Ga. App. 137, 493 S.E.2d 532 (1997).

Child molestation as a lesser included offense of rape should not have been submitted to the jury because the rape indictment did not allege that the victim was under the age of 16, which is an essential element of the offense of child molestation. *Heggs v. State*, 246 Ga. App. 354, 540 S.E.2d 643 (2000).

Failure to charge lesser included offense. — Because the defendant was acquitted of the charges in the indictment and convicted only of a lesser included charge not listed in the indictment, statutory rape, an erroneous jury charge authorizing the conviction of statutory rape

would have been a substantial error harmful as a matter of law; therefore, the appellate court addressed the merits of the defendant's appellate challenge to a jury instruction on statutory rape, despite the fact that the defendant did not object to the instruction at trial. *Stulb v. State*, 279 Ga. App. 547, 631 S.E.2d 765 (2006).

Charge which failed to define elements of assault. — In a prosecution for aggravated assault, failure to include in the charge the requisite elements of assault was reversible error. *Howard v. State*, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

Where counsel acquiesces in giving of or failure to give instruction.

Where defendant failed to object at trial to a jury instruction allowing intent to kill to be inferred from the use of a deadly weapon, the court found no substantial error because the jury could have concluded there was an intent to kill from the testimony of four witnesses that defendant said defendant was going to kill the victim; hence, no review of the instruction was required under O.C.G.A. § 5-5-24(c). *Lester v. State*, 262 Ga. App. 707, 586 S.E.2d 408 (2003).

In a first degree forgery prosecution, the trial court should not have instructed the jury that it was not bound to believe testimony as to facts incredible, impossible or inherently improbable, but the defendant's failure to object, O.C.G.A. § 5-5-24(c), waived the error given the strength of the evidence against the defendant and the trial court's charge in its entirety. *Overton v. State*, 277 Ga. App. 819, 627 S.E.2d 875 (2006).

Review of substantial error under O.C.G.A. § 5-5-24(c) was not available to a defendant who argued that a trial court erred in failing to give a jury charge on justification after a drug buyer attempted to rob the defendant's acquaintance because the failure to give the instruction was acquiesced in by counsel pursuant to the defense theory that the defendant did not have a gun and was merely present at the scene as an innocent bystander. *Newton v. State*, 303 Ga. App. 852, 695 S.E.2d 79 (2010).

Charge on element of intent.

Because defendant failed to object to a

jury charge on criminal intent or to reserve any objections, any error asserted on appeal was waived, as there was no substantial error shown pursuant to O.C.G.A. § 5-5-24(c); the trial court's instruction did not improperly shift the burden of proof to defendant and the instruction did not deprive defendant of a fair trial. *Allen v. State*, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Failure to instruct on actual and constructive possession.

Failure to give an unrequested instruction on actual and constructive possession did not require reversal since, under the circumstances, it was not required in order to provide the proper guideline for the verdict. *Edmond v. State*, 228 Ga. App. 695, 492 S.E.2d 583 (1997).

Charge on theory of reasonable probable use in a condemnation proceeding was erroneous because it allowed the jury to determine the value of the land on the date of the taking without ascribing any value to subterranean limestone deposits. *Gunn v. DOT*, 222 Ga. App. 684, 476 S.E.2d 46 (1996).

Charge on the burden of proof in a condemnation action was an error of law and was prejudicial because it went to the primary issue in the case, the value of the property, and shifted the burden of proof on that issue. *Pendarvis Constr. Corp. v. Cobb County-Marietta Water Auth.*, 239 Ga. App. 14, 520 S.E.2d 530 (1999).

Misstatement as to statute of limitations. — Even though no objection was made to a jury charge, a misstatement therein as to the applicable statute of limitations in a child molestation case was reversible error since the jury could not have found defendant guilty if the correct charge had been given. *Early v. State*, 218 Ga. App. 869, 463 S.E.2d 706 (1995).

Instructions erroneously stating operation of law. — In an action to recover damages for fraud connected with the sale and purchase of a car, the trial court's erroneous recharge directing the jury that the car would be returned to the seller by operation of law was so blatantly in error as to raise the question whether the buyer was deprived of a fair trial; further, the error was an error of law and

it was prejudicial because it went to the primary issue in the case, the value of the car, and nothing in the evidence supported the jury verdict and subsequent judgment returning the car to the seller. *Brown v. Garrett*, 261 Ga. App. 823, 584 S.E.2d 48 (2003).

There was no substantial error in the jury charge, etc.

as the friend who testified against defendant had already been convicted of the crime at the time of defendant's trial and there was no evidence of any deals with the state; defendant did not show that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that it raised a question whether defendant was deprived of a fair trial and thus waived objection to the charge. *Jackson v. State*, 259 Ga. App. 727, 578 S.E.2d 298 (2003).

With regard to a defendant's conviction on child molestation charges, the trial court did not err by failing to give a limiting instruction, absent a request, prior to testimony of certain acts the defendant committed against the victim two years before the incidents for which the defendant was on trial; defendant's failure to request such a limiting instruction required the defendant to demonstrate that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that the charge raised a question whether the defendant was deprived of a fair trial, however the defendant failed to make any such showing. *Nichols v. State*, 288 Ga. App. 118, 653 S.E.2d 300 (2007).

In convictions that included aggravated assault on a peace officer, defendant failed to show substantial error under O.C.G.A. § 5-5-24(c) in the instruction regarding use of a handgun as a deadly weapon because, viewed as a whole, the jury charge did not take from the jury's consideration the issue of whether the handgun was a deadly weapon. *Smith v. State*, 301 Ga. App. 670, 688 S.E.2d 636 (2009).

Error to find waiver based on induced error. — It was error to hold that personal injury plaintiffs had waived appellate review of a jury recharge under O.C.G.A. § 5-5-24(c) based on the doctrine of induced error; the "induced error" consisted solely of the plaintiffs' alleged fail-

ure to request specific language that would have made the recharge accurate and to object to the absence of an instruction concerning the foreseeability of an intervening act, and thus the acts the court of appeals held to have induced the error were the same acts excused by § 5-5-24(c) when there was substantial error in the charge. *Pearson v. Tippmann Pneumatics, Inc.*, 281 Ga. 740, 642 S.E.2d 691 (2007).

Error not harmful as a matter of law. — The trial court's failure to give a charge under O.C.G.A. § 24-4-6 was not harmful as a matter of law because the state presented direct evidence that the defendant committed the crime of kidnapping. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, 2008 Ga. LEXIS 153 (Ga. 2008).

Failure to give inconsistent charge did not constitute substantial error.

— In a wrongful death suit brought by a personal representative, a failure to give a certain instruction did not constitute substantial error; the instruction would have been inconsistent with the procedures adopted by the trial court and acquiesced in by the parties, and the representative had not requested the instruction, so the asserted error was waived. *Turner v. New Horizons Cmty. Serv. Bd.*, 287 Ga. App. 329, 651 S.E.2d 473 (2007).

Incorrect charge on fraudulent intent. — An erroneous jury instruction regarding misrepresentation and concealment could be considered on appeal pursuant to O.C.G.A. § 5-5-24(c) even though grounds for an objection had not been stated as required by § 5-5-24(a). The charge, which incorrectly stated that fraudulent intent did not have to be proven, concerned legal principles that were central to the defense that a closing attorney had not acted with fraudulent intent. *Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*, 288 Ga. App. 350, 654 S.E.2d 190 (2007), cert. denied, 2008 Ga. LEXIS 288 (Ga. 2008).

Use of the word "a" instead of "the" was not substantial error warranting review absent an exception. — Trial court's substitution of the word "a" for "the" in a jury charge regarding the factors to be used in the equitable division of

marital property was not so substantial or necessarily harmful as to warrant review under O.C.G.A. § 5-5-24(c) when no ex-

ception was taken by the spouse. *Coe v. Coe*, 285 Ga. 863, 684 S.E.2d 598 (2009).

5-5-25. Other grounds.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

1. IN GENERAL
3. GROUNDS WARRANTING NEW TRIAL
4. GROUNDS INSUFFICIENT TO WARRANT NEW TRIAL
5. IMPROPER SUBJECT MATTER FOR MOTION FOR NEW TRIAL

General Consideration

Compare to motion in arrest of judgment. — Court of Appeals of Georgia could not consider the defendant's motion for a new trial as a viable procedural substitute for a motion in arrest of judgment. *Kirkland v. State*, 282 Ga. App. 331, 638 S.E.2d 784 (2006).

Insufficient objection. — The objection raised below was not sufficient to direct the trial court's attention to the claimed error and was not stated with sufficient particularity to leave no doubt about the portion of the charge challenged or what the specific ground of challenge was; therefore, the issue was not preserved on appeal. *Anderson v. State*, 231 Ga. App. 807, 499 S.E.2d 717 (1998).

Trial court did not err in denying the defendant's motions for a mistrial because the defendant requested a curative instruction after the motion for a mistrial was denied, and the trial court instructed the jury to disregard a witness's comment, and since defense counsel did not renew the mistrial motion thereafter, the defendant could not complain of the failure to grant the motion. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Cited in *Bunch v. Mathieson Drive Apts., Inc.*, 220 Ga. App. 855, 470 S.E.2d 895 (1996); *Prescott v. Builders Transp., Inc.*, 251 Ga. App. 280, 554 S.E.2d 241 (2001); *Melcher v. Melcher*, 274 Ga. 711, 559 S.E.2d 468 (2002); *Brooks v. State*, 281 Ga. 514, 640 S.E.2d 280 (2007); *Walker v. State*, 281 Ga. 521, 640 S.E.2d 274 (2007); *Rivera v. State*, 282 Ga. 355,

647 S.E.2d 70 (2007); *State v. O'Neal*, 292 Ga. App. 884, 665 S.E.2d 926 (2008); *Laster v. State*, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Application

1. In General

Excluded evidence. — Trial court did not err in denying the defendant a new trial, as a statement to police the defendant made was freely and voluntarily given upon the issuance of Miranda warnings, and the trial court properly excluded evidence of prior abuse committed against the victims by third parties on relevancy grounds, not under the rape shield statute, O.C.G.A. § 24-2-3. *Segura v. State*, 280 Ga. App. 685, 634 S.E.2d 858 (2006).

Evidence properly admitted. — The trial court did not err in denying the defendant's motion to suppress the results of a blood test, as the notice given to the defendant by a state trooper under the implied consent law, O.C.G.A. § 40-5-67.1(a), was sufficiently accurate to permit the defendant to make an informed decision about whether to consent to testing, and the evidence failed to show that the defendant requested an independent test. Thus, the defendant was also properly denied a new trial on those grounds. *Collins v. State*, 290 Ga. App. 418, 659 S.E.2d 818 (2008).

Trial court did not err in denying the defendant's motion for mistrial when a police officer testified that the defendant admitted the defendant's involvement in

another incident after the trial court had granted the defendant's motion in limine to exclude any evidence of the defendant's admitted involvement in another criminal matter because the officer's testimony referred to another incident and not another crime per se, and the defendant did not show that a mistrial was essential to preserve the defendant's right to a fair trial; any error was harmless in light of the overwhelming evidence of the defendant's guilt. *Nyane v. State*, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial court did not err when the court denied the defendant's motion for new trial on the basis that the state proffered similar transaction evidence of an incident that occurred when the defendant was a juvenile because the trial court did offer to give a curative instruction to the jury, but trial counsel refused the curative instruction citing "strategy" as counsel's reasons; the trial court admonished the witness not to make any references to the juvenile court proceeding. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Jury misconduct warranting new trial.

Trial court did not abuse the court's discretion by denying the defendant's motion for mistrial because a juror's improper behavior was brought to the trial court's attention immediately after the behavior occurred, and upon learning of the improper behavior, the trial court examined the offending juror without delay and subsequently dismissed the juror from the jury; the remaining jurors were then examined and indicated by their response to the trial court's question that they had not overheard any comments on the case by the offending juror, and thus, even though the alleged improper comment involved the ultimate issue in the case, the record reflected no evidence that the jury was tainted or that the defendant was harmed by the juror's misconduct. *Brown v. State*, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Claim of incompetence of counsel.

The court of appeals rejected the defendant's contention on appeal that the trial court prevented the defendant to fully

develop an ineffective assistance of counsel claim at the hearing on a motion for a new trial, as the record was replete with evidence that the defendant was given a great deal of latitude and ample opportunity to develop the issue. *Brown v. State*, 285 Ga. App. 453, 646 S.E.2d 289 (2007), cert. denied, No. S07C1503, 2007 Ga. LEXIS 672 (Ga. 2007).

Trial court did not err in denying defendant's motion for a new trial after the defendant was convicted of statutory rape because defendant did not receive ineffective assistance of counsel; the trial court's determination that defendant's trial counsel articulated a reasonable defense strategy was not clearly erroneous because counsel made a strategic decision that a specific line of investigation was unnecessary since the expected finding from the investigation would not have been helpful to the defense employed, and at trial, counsel presented evidence consistent with the defense strategy. *Burce v. State*, 299 Ga. App. 849, 683 S.E.2d 901 (2009).

Ineffective counsel established as to one charge but not as to other. — Because the defendant presented sufficient evidence to show that trial counsel was ineffective in failing to stipulate to the defendant's felon status or to obtain a jury charge limiting the jury's consideration of the defendant's criminal history, such failures prejudiced the defendant's defense sufficiently to require a new trial on a charge of aggravated assault; however, given the defendant's admission to possessing a gun at the time of the altercation, no prejudice resulted to warrant reversal and a new trial on the possession of a firearm by a convicted felon conviction. *Starling v. State*, 285 Ga. App. 474, 646 S.E.2d 695 (2007).

Untimely objection. — Because defendant asserted for the first time in an out-of-time appeal that the trial counsel rendered ineffective assistance, but defendant had failed to assert that claim at the trial court level, nor did the appellate counsel seek a new trial and raise that issue upon the out-of-time appeal request having been granted, the appellate court was barred from reviewing the issue; a claim of ineffective assistance had to be raised at the earliest possible time, which

in this instance would have been through a new trial motion. *Swan v. State*, 276 Ga. App. 827, 625 S.E.2d 97 (2005).

Notice of appeal untimely. — Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order, and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court entered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Notice of appeal timely. — Because the defendant filed a notice of appeal within 30 days after the trial court denied the defendant's motion for new trial, the defendant's appeal was properly before the court of appeals and would be considered on the motion's merits. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Direct action in corporate dispute. — Trial court did not err in denying plaintiffs' motion for a new trial or, alternatively, judgment notwithstanding the verdict, pursuant to O.C.G.A. §§ 5-5-25 and 9-11-50, after a jury verdict was rendered in favor of defendant in a shareholder dispute arising from an agreement for purchase of defendant's shares, as the direct action by defendant on the counterclaim for breach of fiduciary duty/usurpation of corporate opportunity was properly brought under *Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983), because there were exceptional circumstances, despite the fact that the corporation did not fit the definition of a statutory close corporation under O.C.G.A. § 14-2-902. *Telcom Cost Consulting, Inc. v. Warren*, 275 Ga. App. 830, 621 S.E.2d 864 (2005).

Valid waiver by defendant. — Because the state presented sufficient extrinsic evidence showing that the defendant knowingly and voluntarily waived a jury trial, even though this evidence conflicted with the defendant's later testimony at the hearing on the motion for a new trial, the trial court did not err in denying the defendant a new trial. *Davis v. State*, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

3. Grounds Warranting New Trial

General grounds did not warrant new trial. — Because there was some evidence supporting the jury's verdict in favor of homeowners in their class action against a private water system owner, the trial court did not err in denying the owner's motion for new trial and the owner's motion for a judgment notwithstanding the verdict on general grounds, and since the case involved disputed factual issues, the trial court properly allowed the jury to resolve those issues. Although the owner argued that the jury did not interpret the facts as the owner believes the jury should have, that argument presented no grounds that would allow the court of appeals to find error by the trial court in refusing to overturn the jury's verdict. *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Ineffective assistance of counsel. — Defense counsel's introduction of certified copies of convictions of state's witnesses to impeach them, without redacting the portion that implicated defendant as a participant in those crimes, which were identical or incidental to the crimes for which defendant was on trial, was deficient performance by counsel as the main evidence against defendant was the testimony from those witnesses and there was no physical evidence that linked defendant to the crimes, the fact that defendant was involved with those same defendants in prior similar crimes could have led the jury to conclude that the same pattern was being repeated, and there was a reasonable probability that, but for counsel's ineffective assistance, the outcome of the trial would have been different, such that defendant was entitled to a new trial

pursuant to O.C.G.A. § 5-5-25. *Whitaker v. State*, 276 Ga. App. 226, 622 S.E.2d 916 (2005).

Trial court committed reversible error when it did not address a defendant's claim that defense counsel failed to support post-conviction remedies, deliberately foregoing a direct appeal for four years without the defendant's consent, because that ground was closely connected to the defendant's repeated effort to obtain appellate counsel and as such, a hearing was required; moreover, the defendant was entitled to rely on the fact that a hearing on the motion was scheduled, and as a result, no action was taken to waive or abandon a right to a hearing. *Jones v. State*, 280 Ga. App. 287, 633 S.E.2d 806 (2006).

Upon the state's appeal pursuant to O.C.G.A. § 5-7-1(a)(7), as amended in 2005, the appeals court found that the defendant was properly granted a new trial based on ineffective assistance of trial counsel, given counsel's failure to interview any of the state's witnesses, present a viable defense to the charge of involuntary manslaughter, and adequately investigate whether the victim's death might have been an accident. *State v. McMillon*, 283 Ga. App. 671, 642 S.E.2d 343 (2007).

Because: (1) the defendant raised a colorable claim of ineffective assistance of trial counsel in a motion for a new trial based on counsel's failure to locate and present evidence of specific acts of violence by the alleged victim against third persons; (2) trial counsel's statement as to unsuccessfully attempting to locate these witnesses did not negate the possibility that a failure to do so constituted deficient performance; and (3) the defendant raised the ineffective assistance claim at the earliest practicable opportunity, albeit on appeal, the defendant asserted a colorable claim of ineffective assistance that required an evidentiary hearing on remand for its resolution. *Portilla v. State*, 285 Ga. App. 401, 646 S.E.2d 277 (2007).

The trial court did not abuse its discretion in granting the defendant a new trial based on ineffective assistance of trial counsel as: (1) counsel's pretrial investigation was deficient; (2) counsel made no

effort to investigate or to obtain the criminal records of the state's similar transaction witness before trial, and did not ask for more time or a continuance upon learning that the defendant did not have the records; (3) the defendant pointed out that the jury had doubts about the victim's testimony based on their verdict of guilt to sexual battery, as a lesser-included offense of child molestation, the crime the defendant was charged with committing; (4) there was evidence that the victim had reason to lie; (5) the charged incident was not reported until after the defendant's wife hired a divorce lawyer, who then arranged the first interview between the victim and investigators; and (6) given that the evidence against the defendant was not overwhelming, this impeachment evidence was particularly crucial. *State v. Lamb*, 287 Ga. App. 389, 651 S.E.2d 504 (2007), overruled on other grounds, *O'Neal v. State*, 285 Ga. 361, 677 S.E.2d 90 (2009).

Because the defendant's claim as to the pre-trial ineffective assistance of appointed counsel could not be resolved by the record on appeal, the denial of a new trial as to that claim was reversed, and the case was remanded for a hearing on that claim only. *Robinson v. State*, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Defendant, who was convicted of violating Georgia's Peeping Tom Statute, O.C.G.A. § 16-11-61, was entitled to a new trial since defendant's counsel failed to investigate the impact of defendant's multiple sclerosis, which might have been sufficient to create a reasonable doubt as to whether defendant acted with the purpose of spying on the victim. *Fedak v. State*, 304 Ga. App. 580, 696 S.E.2d 421 (2010).

Right to be present violated. — Because the defendant had a right to be present in the courtroom during voir dire of the jury, regarding some suspicious telephone calls that some had been receiving, in order to assist trial counsel in effectively examining the jurors regarding their abilities to be fair and impartial, and the defendant did not waive said right, the trial court erred in denying the defendant's motion for a new trial. *Vaughn v. State*, 281 Ga. App. 475, 636 S.E.2d 163 (2006).

Deprivation of right to opening and closing arguments.

Defendants were improperly denied the right to open and close final argument where defense counsel used a police officer's report to cast doubt on the officer's recollection and credibility, and did not read the police and child services agencies' reports into evidence when attempting to implicate other family members; while the evidence was sufficient to support the convictions, it was not overwhelming, so the error was not harmless and defendants were entitled to a new trial. *Thomas v. State*, 262 Ga. App. 492, 589 S.E.2d 243 (2003).

Judge's expression of opinion on evidence.

Because the trial court's charge to the jury regarding the defendant's inculpatory statement amounted to plain error in expressing an opinion as to what had been proven, thereby violating O.C.G.A. § 17-8-57, a new trial was ordered on remand. *Chumley v. State*, 282 Ga. 855, 655 S.E.2d 813 (2008).

Improper comment on evidence by court was reversible error. — On appeal from an aggravated assault conviction, because the trial judge improperly commented on the evidence in violation of O.C.G.A. § 17-8-57 by telling the jury that the parties agreed that there was no gun involved in the incident, the comment amounted to reversible error entitling the defendant to a new trial. *Brimidge v. State*, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

Error in jury instructions as to elements of offense charged. — Defendant's convictions on two counts of criminal solicitation to commit a felony (murder) were reversed for a new trial, as the trial court erred in failing to instruct the jury on the definitions of the words "felony" and "murder" as essential elements of the crime charged. *Essuon v. State*, 286 Ga. App. 869, 650 S.E.2d 409 (2007).

Error in admitting parol evidence. — In an action involving the sale of land, because no adequate description of the property sought to be sold could be found within the four corners of the parties' final agreement, no exhibits were attached,

and the words used in the contract did not provide a sufficient description of the land, the trial court erred in admitting parol evidence to provide a legally sufficient description of the property at issue; hence, the property owners' motions for directed verdict, judgment notwithstanding the verdict, and for a new trial were erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

Error in admitting expert testimony. — In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light, as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. *Purcell v. Kelley*, 286 Ga. App. 117, 648 S.E.2d 454 (2007).

Error in admitting similar transaction evidence. — While state presented sufficient evidence of victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed; thus, matter was remanded for new trial. *Usher v. State*, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

New trial granted where key evidence was illegally obtained by police. — Because no exigency existed to justify a search after the defendant was handcuffed and placed under the watchful eye of a police officer, and even assuming that the defendant was under arrest while being detained in the kitchen, a search of the defendant's bedroom which yielded a shotgun, found under the bed in the bedroom; a box of unspent shotgun shells, and some loose unspent shotgun shells, was not one incident to said arrest; thus, the defendant's possession of a firearm while a convicted felon conviction was reversed, and the case was remanded for a new trial in which the illegally-obtained evidence

could not be introduced. *Hicks v. State*, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Husband did not waive right to jury trial. — Trial court abused its discretion in denying a husband's motion for a new trial and to set aside the decree of divorce, as the husband's actions in showing up 45 minutes late in answering a calendar call did not amount to either an expressed or implied waiver of an asserted right to a jury trial, and the husband did not expressly consent to a bench trial. *Walker v. Walker*, 280 Ga. 696, 631 S.E.2d 697 (2006).

New trial granted where trial court failed to dismiss juror for cause. — In a medical malpractice action, because the trial court abused its discretion by failing to dismiss a specific juror for cause based on that juror's partiality to doctors and intimations that they should be given special protections, and despite the clear efforts of the court and defense counsel to rehabilitate the juror, the decedent's spouse was awarded a new trial. *Sellers v. Burrowes*, 283 Ga. App. 505, 642 S.E.2d 145 (2007).

New trial ordered where evidence improperly admitted. — Because the seizure of cash found on the defendant's person was conducted based on a lawful arrest for a domestic violence act of assault, given information by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, the trial court properly denied suppression of the evidence; however, because the defendant maintained a reasonable expectation of privacy in the curtilage surrounding the defendant's residence, absent a warrant or exigent circumstances, suppression of cocaine found in that area was erroneously denied, and as such the defendant was erroneously denied a new trial. *Rivers v. State*, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

In a negligent misrepresentation action filed by a business against its accountants, the business was entitled to a new trial as the trial court twice erred by admitting irrelevant and prejudicial evidence that: (1) the business was sold for \$65.5 million in 2005, in order to establish the business's 1993 value, as the sale was too remote, the business had undergone

physical changes since the sale, and the market conditions had also changed; and (2) the loans from a shareholder to purchase and operate the business were later reclassified as a shareholder investment of capital, and that the debt owed to the shareholder was forgiven in exchange for the issuance of additional stock in the business as such was irrelevant to the determination of whether the business was entitled to direct damages. *Atlando Holdings, LLC v. BDO Seidman, LLP*, 290 Ga. App. 665, 660 S.E.2d 463 (2008).

Improper comment on defendant's silence required new trial. — Because the trial court erroneously commented on the defendant's refusal to make a post-arrest statement to police, and the error, absent a curative instruction, was not harmless or the result of inadvertence, the defendant's robbery by sudden snatching conviction was reversed; thus, the trial court erred in denying the defendant a new trial on those grounds. *Wright v. State*, 287 Ga. App. 593, 651 S.E.2d 852 (2007).

No improper comment on right to remain silent by informing jury of defendant's request to terminate interview. — Trial court did not err in denying the defendant's motion for new trial because the state did not improperly comment on the defendant's pre-arrest right to remain silent; informing the jury of the defendant's termination of a custodial interview and invocation of the right to counsel did not amount to an improper comment on the right to remain silent warranting the reversal of the defendant's conviction. *McClarin v. State*, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, U.S. , 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

No improper reference on right to remain silent. — Trial court did not err in denying the defendant's motion for mistrial because a state witness's reference to the defendant's invocation of the right to remain silent was not directed to a particular statement or defense offered by the defendant, was made during a narrative explanation, and was promptly addressed with a thorough curative instruction by the trial court to the jury. *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Error in admitting erroneous impeachment evidence. — In a personal injury suit filed by a car driver against a truck driver, because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emergency room physician, a new trial was ordered. *Laukaitis v. Basadre*, 287 Ga. App. 144, 650 S.E.2d 724 (2007).

New trial authorized where prejudgment interest on damages exceeded recovery amount authorized by evidence. — Pursuant to instructions from trial court, while jury was authorized under O.C.G.A. § 13-6-13 to increase the \$24,698.39 in breach of contract damages by adding prejudgment legal interest to damages at the rate of seven percent per annum simple interest from the date of the breach, jury's general verdict on the breach of contract claim in amount of \$42,690.05 was in excess of any recovery authorized by the evidence; as a result, judgment entered on the verdict had to be reversed and the case remanded for new trial. *Chacon v. Holcombe*, 290 Ga. App. 767, 660 S.E.2d 851 (2008).

Reading newspaper editorials which destroy freedom, etc.

Given the lack of clarity as to the award of a single amount of damages for the breaches of fiduciary duty by both the son and the son's wife, and an award of \$92,000 in attorney fees, a new trial was ordered. *Lou Robustelli Mktg. Servs. v. Robustelli*, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

Erroneous jury instruction. — Because the trial court erroneously instructed the jury as to a married couple's failure to wear their seatbelts as evidence of negligence or causation or to diminish any recovery, and such likely prejudiced them, a new trial was warranted. *King v. Davis*, 287 Ga. App. 715, 652 S.E.2d 585 (2007).

Failure to give instruction. — Because there was some evidence, even from the state's witnesses, that showed that the defendant committed an act of following too closely, a traffic violation other than

the more culpable offense of DUI, that may have caused the collision and resulting death, the trial court erred in failing to give the defendant's written request for an instruction on second-degree vehicular homicide; thus, the trial court erred in denying the defendant's motion for a new trial as to the first-degree vehicular homicide convictions. *Brown v. State*, 287 Ga. App. 755, 652 S.E.2d 631 (2007).

Defendant was entitled to a new trial because there was a reasonable possibility that the jury convicted the defendant of child molestation, O.C.G.A. § 16-6-4(a), in a manner not charged in the indictment since the trial court did not give a limiting instruction to ensure that the jury would find the defendant guilty in the specific manner charged in the indictment or instruct the jury not to consider child molestation as having occurred in another manner; when the jury expressed the jury's confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit the jury's consideration to determining whether the defendant was guilty of committing child molestation in the specific manner alleged in the indictment only. *Smith v. State*, 310 Ga. App. 418, 714 S.E.2d 51 (2011), cert. denied, 2012 Ga. LEXIS 249 (Ga. 2012).

Habeas action. — Since the petitioner's conviction had already been reviewed on direct appeal, the habeas corpus court erred in ordering a new appeal, as the proper remedy would have been to order a new trial; consequently, remand was ordered for the entry of an order granting a new trial. *White v. Smith*, 281 Ga. 271, 637 S.E.2d 686 (2006).

4. Grounds Insufficient to Warrant New Trial

Harmless error.

Because the trial court's admission of prejudicial hearsay testimony regarding the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal; hence, defendant's motion for a new trial was properly

denied. *Smith v. State*, 283 Ga. App. 722, 642 S.E.2d 399 (2007).

Comments by judge during defense counsel's closing argument did not constitute plain error. — Under a plain error analysis, there was no violation of O.C.G.A. § 17-8-57 in defendant's criminal trial because the trial judge's comments were limited in scope, were for the purpose of controlling the trial conduct and ensuring a fair trial, did not involve the issue of defendant's guilt or innocence, and did not express an opinion on the evidence as to what was proved or not; comments by the trial court judge during defendant's counsel's closing arguments were for the purpose of preventing misstatements to the jury concerning matters not in evidence and were not improper under O.C.G.A. § 17-8-75, and denial of defendant's new trial motion under O.C.G.A. § 5-5-25 was proper. *Mathis v. State*, 276 Ga. App. 205, 622 S.E.2d 857 (2005).

Comments by trial judge. — Because the trial court did not make improper comments about the defendant's credibility, in violation of O.C.G.A. § 17-8-57, but only directed the defendant to answer the questions being asked, and expressed no opinion as to the truthfulness of the defendant's testimony, whether responsive or not, said comments did not warrant a new trial. *Anthony v. State*, 282 Ga. App. 457, 638 S.E.2d 877 (2006).

The trial court did not err in denying the defendant's motion for a new trial on the ground that the trial judge made comments which unduly highlighted and overemphasized the testimony of the DNA expert, in violation of O.C.G.A. § 17-8-57, as the comments were clearly directed at one juror to encourage that juror to stay awake and pay attention to the presentation of the evidence. *Carruth v. State*, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Actions involving the trial judge did not warrant new trial. — The defendant was not entitled to a new trial merely because the order appointing the senior judge under O.C.G.A. § 15-1-9.1(b)(2) was defective as that issue was raised for the first time in the new trial motion, which precluded appellate review; moreover, a new trial was not

warranted due to a comment made by the sentencing judge, that could have been interpreted as an expression of the trial court's disapproval of the defendant's conduct, and such did not amount to an outright statement of bias. *Williams v. State*, 290 Ga. App. 829, 661 S.E.2d 563 (2008).

Venue sufficiently established. — Trial court did not err in denying the defendant's motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a detective's testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant's argument that the evidence only supported the conclusion that the victim could have been driven into another county before the rape occurred, that would not preclude a jury's conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. *Bizimana v. State*, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Standing. — Father was not entitled to a new trial on a termination of rights petition filed by the Department of Family and Children Services, as the father failed to legitimate the child at issue, and hence, lacked standing to challenge the termination of parental rights order. In the Interest of *J.L.E.*, 281 Ga. App. 805, 637 S.E.2d 446 (2006).

Evidence properly admitted. — Convictions for driving under the influence of drugs and to the extent that the defendant was a less-safe driver were upheld on appeal as supported by sufficient evidence, given that the defendant drove erratically, manifested signs of impairment, and had three drugs in the defendant's system; hence, when coupled with the fact that no evidence of tampering with the defendant's urine sample was submitted, the trial court did not abuse its discretion in admitting the sample and in denying the defendant's motion for a new trial. *Kelly v. State*, 281 Ga. App. 432, 636 S.E.2d 143 (2006).

Defendant's amended motion for a new

trial was properly denied, and an aggravated assault conviction was upheld on appeal, as the trial court did not abuse its discretion in admitting three photographs depicting the victim's knife wounds; said photographs were not inadmissible merely because they also showed alterations to the victim's body made by medical personnel. *McRae v. State*, 282 Ga. App. 852, 640 S.E.2d 323 (2006), cert. denied, 2007 Ga. LEXIS 200 (Ga. 2007).

Because evidence of the defendant's prior drug use, and history of crimes committed against family members fueled by the same, were properly admitted as relevant to the crime's charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal; moreover, even if the trial court erred by admitting this motive evidence, no reversible error resulted which required a new trial. *Jones v. State*, 283 Ga. App. 812, 642 S.E.2d 887 (2007).

The defendant's motion for a new trial was properly denied, as the evidence presented against the defendant was legally sufficient, similar transaction evidence was correctly admitted, and the fact that portions of the methamphetamine found, as a result of a search warrant was not tested, was not reversible error. *Perry v. State*, 283 Ga. App. 520, 642 S.E.2d 141 (2007).

In a prosecution for armed robbery and robbery by intimidation, the trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to O.C.G.A. §§ 24-3-14 and 24-5-26, despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the fingerprint card, as the card itself showed that it was created and transmitted at the time of the defendant's arrest, and was handled in the gathering agency's regular and routine course of business; hence, the defendant was properly denied a new trial. *Tubbs v. State*, 283 Ga. App. 578, 642 S.E.2d 205 (2007).

While the state conceded that the trial court's instruction on prior consistent statements was incorrect, a new trial was not required because the statements in

question were admitted, not as prior consistent statements, but as admissions by the defendant, and were introduced into evidence by the state as substantive evidence of the defendant's guilt. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

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As sufficient evidence supported the defendant's convictions, and no reversible error resulted from either the admission of the defendant's two prior convictions for both impeachment and sentencing purposes or based on the jury instructions given or refused, a new trial on these issues was unwarranted. *Newsome v. State*, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, No. S08C1042, 2008 Ga. LEXIS 494 (Ga. 2008).

The trial court did not err in admitting evidence of the defendant's 1993 interference with government property conviction; a new trial was properly denied, because the evidence was properly admitted, not as substantive evidence of the offense at issue, but only as to the issue of credibility, providing support for its admission. *Tate v. State*, 289 Ga. App. 479, 657 S.E.2d 531 (2008), cert. denied, 2008 Ga. LEXIS 386 (Ga. 2008).

Contesting sufficiency of indictment. — In a prosecution for burglary, because the variance between the indictment and the proof presented at trial did not misinform or mislead the defendant in any manner that resulted in surprise or impaired a defense, and the defendant could not be subjected to another prosecution for the same offense, the alleged variance was not fatal; as a result, the trial court did not err in denying the defendant's motions for a directed verdict or for a new trial. *Chambers v. State*, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

Because the appeals court rejected the defendant's claim that the accusation failed to adequately charge venue, as a

charge of DUI incorporated the words "Henry County" in the heading by using the phrase "as prosecuting attorney for the county and state aforesaid" in the body of the accusation, the trial court did not err in denying the defendant a new trial on that charge; but the court warned the state against such practice, as the solicitor could easily devise forms which stated with clarity the county in which the offense allegedly occurred, and thereby avoid the costs which resulted from having to repeatedly defend the type of challenge the defendant raised. *Gordy v. State*, 287 Ga. App. 459, 651 S.E.2d 471 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Although the trial court might not have been presented with evidence that the defendant was in physical possession of a firearm during the hijacking of the victim's car, because the evidence that was presented authorized a finding that the defendant was a party to that crime, and that all those involved were joint conspirators, the trial court did not err in denying the defendant a new trial on grounds that the indictment charging possession of a firearm during the commission of a felony was at fatal variance with the proof presented at trial. *Davis v. State*, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

Effective assistance of counsel. — Defendant's motion for a new trial was properly denied because defendant did not establish that defendant received ineffective assistance of counsel. Defendant was aware of all of the charges against defendant, defendant did not inform counsel that there were jurors that defendant wished to have stricken, it was sound trial strategy to not cross-examine the witness because the witness's testimony would have hurt defendant, counsel did not request a charge on the voluntariness of defendant's confession because it contradicted the defense of coercion, the evidence adequately demonstrated that defendant was intoxicated when the defendant committed the assault and robbery, and the discrepancy in the victim's testimony regarding the car the perpetrator drove was not material since defendant confessed to the crime. *Blocker v. State*, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

On appeal from two child molestation convictions, the defendant was properly denied a new trial, because the admission of privileged testimony was not erroneous, and trial counsel was not ineffective by: (a) ignoring a consent order barring the state from introducing any written or oral admissions or statements the defendant made before and after a polygraph examination; (b) failing to assert the attorney-client privilege with respect to a polygraph expert's testimony; and (c) failing to adequately prepare a second polygraph expert who testified for the defense at trial; in fact, (1) counsel neither ignored the consent order nor performed deficiently when stipulating to the admission of the polygraph results; and (2) even assuming that counsel was deficient in failing to consult the defendant regarding the attorney-client privilege, the defendant failed to show a reasonable probability that the result would have been different in the absence of the second expert's cumulative testimony. *Adesida v. State*, 280 Ga. App. 764, 634 S.E.2d 880 (2006).

Defendant's ineffective assistance of counsel claims lacked merit, as the appeals court found that trial counsel's tactical decision not to call the defendant's brother and sister-in-law as witnesses was strategic, and nothing in the record suggested that the defendant was denied a fair trial because trial counsel did not investigate the defendant's competency; hence, the trial court did not err in denying the defendant a new trial based on an ineffective assistance of counsel claim. *Scott v. State*, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

In denying the defendant a new trial, the trial court expressly found that trial counsel was not ineffective, specifically finding that: (1) counsel's decision not to provide the defendant with a copy of the discovery was based on the fact that the defendant could not read and was going to rely on someone else at the jail to read the documents, and that counsel was concerned that showing the discovery to another inmate might produce a "snitch;" and (2) prior to trial, counsel spent two and a half hours with the defendant going over the state's evidence. Hence, the trial court concluded that counsel had a good

reason for not giving the defendant a copy of the discovery, and that counsel was exceptionally effective in representing the defendant's interests. *White v. State*, 281 Ga. 20, 635 S.E.2d 720 (2006).

Trial court did not err in denying the defendant a new trial on grounds that his trial counsel was ineffective, as the defendant failed to show that the outcome of the trial would have been different if counsel would have: (1) filed a motion for funds to hire an expert on the reliability of cross-racial eyewitness identification and proffer what the testimony of this expert would have been; (2) verified that funds had been withdrawn from the respective ATM machines on the date of the crime or ascertain whether surveillance cameras might have refuted the state's evidence that the defendant was in the carjacked vehicle; and (3) proffered favorable testimony that the defendant alleged could have been provided by the two victims suggesting complicity. *Pringle v. State*, 281 Ga. App. 230, 635 S.E.2d 843 (2006).

As the jury could have found the defendant guilty after listening to the state's witnesses, a psychologist testimony regarding the defendant's competency did not influence the outcome of the trial; hence, defense counsel's failure to object to the psychologist raising the issue about the defendant's mental health was harmless, part of counsel's reasonable trial strategy, and did not amount to the ineffective assistance of counsel entitling the defendant to a new trial. *Griffin v. State*, 281 Ga. App. 249, 635 S.E.2d 853 (2006).

In a prosecution for trafficking in cocaine, the trial court did not err in refusing to instruct the jury on the affirmative defense of entrapment, as: (1) sufficient evidence was presented that the defendant voluntarily committed the offense upon being given the opportunity to do so; and (2) no evidence was presented to show that the informant employed undue persuasion, incitement or deceit to induce the defendant into selling drugs; thus, the defendant's claim of ineffective assistance of counsel for failing to present evidence to support an entrapment defense was rejected and did not warrant a new trial. *Campbell v. State*, 281 Ga. App. 503, 636 S.E.2d 687 (2006).

In a prosecution for armed robbery, possession of a firearm during the commission of a felony, and obstruction, the defendant was not entitled to a new trial based on allegations that trial counsel was ineffective, as: (1) a jury charge on the testimony of an accomplice was not required; and (2) in light of trial counsel's cross-examination of the accomplice, the court's credibility charge, as well as the overwhelming evidence of the defendant's guilt, a leniency instruction was unnecessary. *Hayes v. State*, 281 Ga. App. 749, 637 S.E.2d 128 (2006).

In a prosecution for rape, kidnapping, and sodomy, the defendant did not receive the ineffective assistance of trial counsel merely because counsel failed to impeach the victim's credibility with evidence concerning a 1996 drug arrest, as: (1) said evidence was irrelevant to the circumstances surrounding the defendant's attack on the victim; and (2) the victim never opened the door to an issue of good character; hence, the defendant failed to show that a new trial should have been ordered. *Pierce v. State*, 281 Ga. App. 821, 637 S.E.2d 467 (2006).

Counsel's trial strategy in failing to object to hearsay from a non-testifying codefendant was supported by a decision that the testimony was more beneficial than prejudicial, and that the complained-of testimony was necessary to refute the state's theory that the gun admitted against the defendant could have thrown from the defendant's car; moreover, because the defendant failed to show that but for the admission of said evidence, the outcome of the trial would have been different, the trial court did not err in denying the defendant a new trial on this ground. *Ross v. State*, 281 Ga. App. 891, 637 S.E.2d 491 (2006).

Appellate court rejected the defendant's contention that trial counsel was ineffective: (1) in failing to investigate another molestation charge filed against the defendant; (2) by failing to interview the defendant's mother; (3) in not investigating the state's failure to obtain a warrant to determine whether the defendant's computer contained or could access pornographic material; (4) by referring to the defendant's prior criminal record on DUI

charges; (5) in introducing several letters from the defendant's daughter into evidence; and (6) by characterizing the defendant in closing argument as guilty of drunken and boorish behavior, as the trial court was authorized to believe counsel's testimony regarding counsel's sufficient preparation for trial, and finding that without a proffer of evidence concerning the defendant's computer, the defendant could not show a reasonable probability that the results of the proceedings would have been different; hence, the trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective. *Carey v. State*, 281 Ga. App. 816, 637 S.E.2d 757 (2006).

Trial court properly denied the defendant's motion for a new trial, which alleged the ineffective assistance of counsel, as mere allegations, without evidence explaining how trial counsel's alleged failures affected the outcome of the trial, could not support said claims and counsel's trial tactics amounted to trial strategy. *Slaughter v. State*, 282 Ga. App. 276, 638 S.E.2d 417 (2006).

Because there was nothing in the record to rebut the presumption that trial counsel had legitimate reasons for the strategic decisions made during the trial, specifically relating to concerns regarding a juror's dismissal, the state's examination of the victim's mother, the refreshment of the state's witness's recollection, and closing argument, a motion for a new trial was properly denied on these grounds. *Hunter v. State*, 282 Ga. App. 355, 638 S.E.2d 804 (2006).

Because the defendant failed to show how trial counsel was ineffective in failing to make objections, failing to file a futile motion to suppress, and failure to object to the admission of evidence, but instead counsel's actions were deemed part of a reasonable trial strategy, the ineffectiveness claim failed and the defendant was not entitled to a new trial on said count. *Opio v. State*, 283 Ga. App. 894, 642 S.E.2d 906 (2007).

A defendant failed to show ineffective assistance of defense counsel for failure to pursue a self-defense or justification defense with regard to the shooting death of the victim since at the hearing on the

motion for new trial trial counsel testified that, given the state of the evidence, trial counsel did not consider a self-defense strategy to be viable, and would be at odds with the strategy chosen, namely to seek a conviction for the lesser crime of voluntary manslaughter. Trial counsel's decision not to pursue inconsistent defenses was made in the exercise of reasonable professional judgment and was reasonable since the evidence from three eye-witnesses showed that the defendant went to the defendant's car and retrieved a pistol, shot the unarmed victim when the victim was retreating, and then went to where the victim lay and shot the victim several more times. *Taylor v. State*, 282 Ga. 693, 653 S.E.2d 477 (2007).

Because the defendant failed to present the testimony of either trial counsel to support a claim of ineffective assistance of counsel, and thus, the record of the new trial hearing was silent as to what actions were taken by counsel to prepare for the plea or to investigate the ramifications of the previous plea, the trial court did not err in denying the defendant's withdrawal of the plea. *Jackson v. State*, 288 Ga. App. 742, 655 S.E.2d 323 (2007).

Defendant's ineffective assistance of counsel claims were without merit, because counsel: (1) adequately explained the decision not to call the defendant's spouse; (2) adequately met with the defendant to discuss the trial strategy and regarding the defendant's decision to waive the right to a jury trial; and (3) had reason to decline objection to the admission of an audio recording of the colloquy between the officers and the defendant at the scene, as that decision supported counsel's trial strategy. Thus, the defendant was not entitled to a new trial based on those claims. *Defrancisco v. State*, 289 Ga. App. 115, 656 S.E.2d 238 (2008).

Because trial counsel was not ineffective in failing to point out a purported discrepancy in the evidence to the jury, failing to investigate alleged evidence tampering, and failing to object to the inclusion of a charge on mutual combat in the jury instructions, or reserve objections to the instructions, the trial court did not err in denying the defendant a new trial. *Sanders v. State*, 283 Ga. 372, 659 S.E.2d 376 (2008).

Trial counsel was not ineffective for failing to request a continuance to review evidence and have the evidence tested by the defendant's own expert because the defendant presented no evidence at the motion for new trial hearing to support the defendant's bald assertion that there was a reasonable probability that the outcome of the proceeding would have been different had counsel sought a continuance or independent expert testing. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

Trial court did not err in denying the defendant's motion for new trial on the ground that the defendant's trial counsel was ineffective since counsel's motion for continuance did not comply with O.C.G.A. § 17-8-25 because the witness in question had not been subpoenaed and, thus, counsel could not comply with the statute; the defendant did not show that the trial court's denial of the motion for continuance was reversible error. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Trial court did not err by rejecting the defendant's claim of ineffective assistance of trial counsel on a motion for mistrial because the defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel. Although the defendant argued that the defendant's trial counsel failed to ask prospective jurors certain questions during voir dire, the defendant made no assertion as to what answers any prospective juror would have given had he or she been asked any of those questions or as to what significance any such answer would have had. The defendant could not show prejudice with regard to the defendant's assertions that counsel failed to fully investigate the case and call essential witnesses because counsel made no proffer as to what a thorough investigation would have uncovered or what the essential witnesses would have said, and the defendant failed to show a reasonable probability that an objection or motion for mistrial related to a detective's testimony would have changed the outcome of the defendant's trial. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant failed to establish a claim of ineffective assistance of counsel due to

counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue, and another witness had already testified without objection that the witness did not call the police on another occasion because the defendant had told that witness "if the cops came he would come out shooting". Because failure to pursue a futile motion did not constitute ineffective assistance, the defendant failed to establish a claim of ineffective assistance of counsel. *Billings v. State*, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

Trial court did not err in denying the defendant a new trial on the ground that defendant's trial counsel's failure to object to the prosecutor's statement during closing argument amounted to ineffective assistance because the defendant could not demonstrate that the deficiency in trial court's performance prejudiced the defendant; the evidence of the defendant's guilt was overwhelming and there was no reasonable probability that the outcome of the defendant's trial would have been more favorable had trial counsel objected, even successfully, to the prosecutor's statement in argument. *Jones v. State*, 288 Ga. 431, 704 S.E.2d 776 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial on the ground of ineffective assistance of counsel because the defendant did not show that: (1) the defense counsel was ineffective in failing to adequately investigate the case or meet with the defendant prior to trial; (2) the defense counsel was ineffective in failing to interview and cross-examine the prosecution's witnesses as the defendant did not establish a reasonable probability that further interviews and cross-examination would have resulted in a different outcome at trial; (3) the defense counsel was

ineffective in failing to file a motion for immunity from prosecution/plea in bar pursuant to O.C.G.A. § 16-3-24.2 based upon the defendant's claim of self-defense as it was a matter of trial strategy and the defendant could not demonstrate how the failure to pursue such a claim harmed the defendant; (4) the defense counsel was ineffective in failing to request a jury charge on the use of force in defense of habitation; and (5) the defense counsel was ineffective in failing to test the thoroughness and good faith of the state's investigation. *Smith v. State*, 309 Ga. App. 241, 709 S.E.2d 823 (2011), cert. denied, No. S11C1266, 2011 Ga. LEXIS 954 (Ga. 2011).

Trial court did not err in denying the defendant's motion for new trial because the trial court properly rejected the defendant's claim that trial counsel was ineffective for failing to introduce into evidence two medical evaluation documents, which the defendant alleged would have contradicted statements witnesses gave to the police; it was mere speculation that the witnesses' statements were inconsistent with the medical reports. *McClarín v. State*, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, U.S. , 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

Defendant was not entitled to a new trial on the basis that trial counsel was ineffective because the defendant failed to establish that there was a reasonable probability that, but for counsel's alleged deficiencies, the outcome of the trial would have been different; even assuming that trial counsel performed deficiently by failing to object to certain testimony, the defendant failed to show a reasonable probability that the outcome of the trial would have been different, and even if trial counsel had filed a motion to suppress certain evidence and that evidence had been excluded, the remaining evidence adduced at trial was overwhelming. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Because the defendant made no showing that the defendant's wife lacked authority to consent to a search of the marital residence, because the trial attorney's strategic decisions not to pursue a defense or to request a jury poll were not patently

unreasonable, and because the defendant's claims were not waived by appellate counsel, the defendant failed to show that the defendant was entitled to a new trial based on counsel's alleged ineffectiveness. *Davis v. State*, 311 Ga. App. 699, 716 S.E.2d 710 (2011).

Defendant was not denied effective assistance of counsel due to trial counsel's failure to renew a motion for mistrial after the trial court gave a curative instruction because the defendant failed to demonstrate prejudice; trial counsel had twice moved for a mistrial, which the trial court denied, and the trial court did not abuse the court's discretion in giving the curative instruction, which preserved the defendant's right to a fair trial. *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

Refusal to allow defendant to dismiss counsel did not warrant new trial. — Because the record showed that the defendant never unequivocally asserted a right to self-representation, the trial court did not err in refusing to allow the defendant to dismiss trial counsel; thus, the trial court properly denied the defendant a new trial. *Pulliam v. State*, 287 Ga. App. 717, 653 S.E.2d 65 (2007), cert. denied, 2008 Ga. LEXIS 159 (Ga. 2008).

Counsel not ineffective. — Because defense counsel's trial strategy, tactics, and tactical errors did not constitute ineffective assistance of counsel and because defendant did not establish that the deficiency prejudiced the defense, the trial court's denial of defendant's motion for a new trial was not clearly erroneous. *Ford v. State*, 272 Ga. App. 798, 613 S.E.2d 234 (2005).

Defendant was not erroneously denied a new trial on grounds that trial counsel was ineffective, as the evidence, via trial counsel's testimony, showed that: (1) counsel, after gathering the defendant's medical history and interviewing the defendant's medical provider, did not believe the defendant was insane; and (2) counsel, after consulting with the defendant and gaining an approval, made a strategic decision not to pursue a mental health defense, opting instead to pursue a claim of self-defense. *Radford v. State*, 281 Ga. 303, 637 S.E.2d 712 (2006).

Defendant's ineffective assistance of counsel claim lacked merit, and did not warrant a new trial, as the defendant failed to show that trial counsel's actions, in which counsel also represented the co-defendant who was the passenger in the vehicle the defendant was driving, prejudiced the defense; further, counsel's actions did not slight the defense of one defendant for another, the principles contained in charges on mere presence and equal access were adequate, counsel was prepared for trial, and the prosecutor's closing argument statements were not prejudicial so as to warrant an objection. *Garvin v. State*, 283 Ga. App. 242, 641 S.E.2d 176 (2006).

In a murder prosecution, the appeals court rejected the defendant's claims that trial counsel was ineffective in failing to pursue a battered woman syndrome defense and by failing to request a jury instruction on the lesser offense of voluntary manslaughter, as: (1) the evidence showed that the defendant, after consultation with counsel, instead chose to focus exclusively on the defense of justification; (2) the evidence did not support a voluntary manslaughter charge; and (3) the defendant did not want the trial court to charge on the same. Moreover, at the new trial hearing, because appellate counsel did not ask trial counsel about the decision not to seek the manslaughter instruction, said decision was presumed to be a strategic. *Ballard v. State*, 281 Ga. 232, 637 S.E.2d 401 (2006).

Defendant's ineffective assistance of counsel claims lacked merit, as: (1) the defendant failed to give any specific examples of prejudice; (2) the defendant, after consultation with counsel, testified freely and voluntarily; and (3) any objections counsel might have made to a videotaped statement would have lacked merit, as said statements contained evidence of prior difficulties, admissible without notice and without the need for a pretrial hearing; hence, the defendant was not entitled to a new trial on said grounds. *Campbell v. State*, 282 Ga. App. 854, 640 S.E.2d 358 (2006).

Because the defendant failed to show that: (1) trial counsel's performance was deficient in failing to call a forensic inter-

viewer as a witness, and said failure prejudiced the defense and would have changed the outcome of the trial; (2) trial counsel's decision not to object to the properly admitted testimony from a forensic interviewer as to the opinion rendered on the victim's intelligence and reactions to certain questions which were consistent with abuse was not ineffective; and (3) the defendant could not show that the failure to call trial attorney affected the outcome of a motion for a new trial, the defendant's ineffective assistance of counsel claims against both trial and appellate counsel lacked merit; thus, the trial court did not err in denying the defendant's motion for a new trial. *Freeman v. State*, 282 Ga. App. 185, 638 S.E.2d 358 (2006).

Appeals court rejected the defendant's ineffective assistance of counsel claims regarding the admission of a tape-recorded statement and claim that trial counsel should have demanded a Jackson-Denno hearing or a hearing to determine the admissibility of a similar transaction, as: (1) proper *res gestae* evidence could be admitted without having to follow the rules regarding prior similar transactions; (2) assuming that trial counsel should have demanded a Jackson-Denno hearing, the defendant failed to show how a hearing would have altered the outcome of the trial; and (3) at a hearing on the motion for a new trial, the defendant failed to introduce any evidence whatsoever to suggest that the statement made was involuntary. *White v. State*, 282 Ga. App. 286, 638 S.E.2d 426 (2006).

Because the defendant failed to support an ineffective assistance of counsel claim with affirmative evidence showing an infringement of rights or a procedural irregularity in the taking of a prior guilty plea, and the defendant failed to show that an objection by trial counsel to the introduction of the prior plea would have been successful, a claim that trial counsel was ineffective, thus warranting a new trial, lacked merit. *Lattimore v. State*, 282 Ga. App. 435, 638 S.E.2d 848 (2006).

Defendant was not entitled to a new trial based on claims of ineffective assistance of trial counsel, as the only evidence offered to support this claim was the de-

fendant's own hearsay testimony as to what the desired witnesses were expected to testify to at trial, and such evidence was insufficient; further, defendant failed to show that counsel's decision to forgo calling such witnesses was unreasonable. *Brigman v. State*, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective, specifically as to issues of the defendant's competency to stand trial and getting the defendant to agree to a bench trial, as: (1) the record showed that defense counsel adequately pursued the competency issue, filed pre-trial discovery motions, obtained an order for defendant's mental evaluation, hired a forensic psychologist to evaluate the defendant's competency, presented and examined witnesses, cross-examined the state's witnesses, and made a closing argument; (2) even if the court were to assume that trial counsel's failure to interview the various doctors constituted deficient performance, the defendant failed to show any prejudice resulting therefrom; and (3) the defendant failed to show that trial counsel was deficient regarding the decision to pursue a bench trial rather than a jury trial, given that the trial court found that the defendant agreed that the case should be submitted to the court on stipulated facts, rather than to the jury. *Wafford v. State*, 283 Ga. App. 154, 640 S.E.2d 727 (2007).

The defendant's trial counsel was not ineffective in failing to object to specifically challenged testimony presented against the defendant, and a new trial was not warranted based on that ineffectiveness, as: (1) counsel explained at the hearing on the new trial motion that objections were not made for strategic and tactical reasons, so as to not draw attention to some of the testimony; (2) some of the testimony hurt the credibility of the state's witnesses while enhancing the credibility of the defense theory; (3) counsel attempted to engender sympathy for the defendant; and (4) the defendant failed to show that the outcome of the trial would have been different if the objections would have been made. *Walls v. State*, 283 Ga. App. 560, 642 S.E.2d 195 (2007).

Because trial counsel was adequately prepared for trial, effectively engaged in plea negotiations, made timely objections, properly handled the defense, was not required to make meritless objections, and the defendant ultimately failed to show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different, counsel was found to not be ineffective; thus, the defendant was not entitled to a new trial. *Garrett v. State*, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

On retrial on one count of child molestation and two counts of aggravated child molestation, the defendant was not entitled to a new trial on grounds that trial counsel was ineffective in admitting notes generated by a forensic evaluator who interviewed the child victim, as the defendant had previously been found guilty in the first trial in which the notes were not introduced. *Mewborn v. State*, 285 Ga. App. 187, 645 S.E.2d 669 (2007).

The defendant's trial counsel was not ineffective in failing to obtain a mental evaluation of the defendant prior to trial to determine criminal responsibility, absent record evidence that counsel had advance notice of any mental health problems, and further discussions with the defendant's family would not have revealed a history of significant mental illness; hence, the defendant was not entitled to a new trial on those grounds. *Breland v. State*, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

Because a transcript of the hearing on the defendant's motion for new trial was not included in the record on appeal, and absent any other proffer of the additional testimony and evidence that the alleged favorable witnesses would have testified to, the defendant could not show a reasonable probability that the outcome of the trial would have been different had trial counsel subpoenaed them; hence, the defendant's ineffective assistance of counsel claim based on the same failed. *Dukes v. State*, 285 Ga. App. 172, 645 S.E.2d 664 (2007).

Despite the defendant's contrary claims, trial counsel was not ineffective in failing to subpoena witnesses necessary to support a defense and failing to ade-

quately raise all issues in his motion to suppress and motion for independent analysis of the suspected narcotics, as: (1) the defendant failed to supply sufficient information about the whereabouts of the witnesses; (2) the defendant failed to produce said witnesses at the motion for a new trial hearing; (3) counsel's strategy in handling the suppression motion showed an appropriate exercise of discretion; and (4) under the theory of defense presented, counsel was not ineffective by failing to obtain an independent examination of the substance tested. *McTaggart v. State*, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

In a prosecution against the defendant under O.C.G.A. § 16-6-4, because the defendant failed to show that trial counsel was ineffective in failing to present an alibi witness, and because the defendant failed to offer evidence that a medical examiner or witnesses from the Department of Family and Child Services would have been favorable to a defense, the defendant's ineffective assistance of counsel claims lacked merit. *Herrington v. State*, 285 Ga. App. 4, 645 S.E.2d 29 (2007), cert. denied, 2007 Ga. LEXIS 548 (Ga. 2007).

The Court of Appeals of Georgia upheld an order denying the defendant's motion for a new trial, as an ineffective assistance of counsel claim based on counsel's alleged failure to communicate lacked merit, given that no reasonable probability existed, nor did the defendant offer any, that the outcome of the trial would have been different absent counsel's alleged deficient performance. *Chambers v. State*, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

The trial court did not err in denying the defendant's amended motion for a new trial based on trial counsel's alleged ineffective assistance, as the evidence failed to show that counsel's trial strategy was unreasonable, the defendant failed to show prejudice by counsel's actions, and the defendant failed to preserve some of the challenges to counsel's actions for appellate review. *Phillips v. State*, 284 Ga. App. 224, 644 S.E.2d 153 (2007).

On appeal from convictions on one count of aggravated sexual battery and two counts of sexual assault, the trial court did not err in denying the defen-

dant's motion for a new trial as the defendant failed to show that any prejudice resulted from counsel's failure to call the defendant's wife to testify for the defense, and the appeals court refused to speculate that the wife's testimony would have led to an acquittal. *Lee v. State*, 286 Ga. App. 368, 650 S.E.2d 320 (2007).

Because it appeared that trial counsel's strategy was to convince the court that insufficient circumstantial evidence was presented in order to convict the defendant, and counsel's decision not to hire an expert to testify as to how quickly the defendant could become intoxicated was a tactical matter to avoid getting into a battle of the experts, those decisions did not amount to ineffective assistance of counsel sufficient to warrant a new trial. *O'Connell v. State*, 285 Ga. App. 835, 648 S.E.2d 147 (2007).

The trial court properly denied the defendant a new trial based on numerous claims of ineffective assistance of trial counsel, as counsel was not ineffective in failing to: (1) make meritless objections; (2) raise what was considered a novel legal argument; (3) file futile motions that would not have changed the outcome of trial; (4) require corroboration of the defendant's confession; and (5) anticipate that the defendant's wife might mislead the defense; moreover, the defendant's claim that counsel was inadequately prepared for trial was belied by the record. *Daly v. State*, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); 553 U.S. 1039, 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

Because trial counsel's strategic decision not to call a close family friend as a witness, who could have rebutted the state's evidence that the defendant was controlling, was supported by testimony that the witness would not have added anything to the defense and might have diluted the defendant's voluntary manslaughter theory, counsel was not ineffective in failing have the witness testify; thus, defendant was properly denied a new trial. *Johnson v. State*, 282 Ga. 96, 646 S.E.2d 216 (2007).

Defendant's ineffective assistance of counsel claims lacked merit, as a motion to strike or for a mistrial after the state's

expert offered an opinion as to the victim's failure to immediately report the abuse was meritless, and counsel's decision as to how to present the defendant's testimony fell within the realm of reasonable trial strategy, and therefore could not be considered deficient; thus, the claims could not serve as the basis for a new trial. *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

The trial court properly denied the defendant's amended motion for a new trial as: (1) the defendant failed to support an assertion that trial counsel was ineffective in failing to listen to an audiotape of the defendant's second interview with the Georgia Bureau of Investigation prior to trial; (2) counsel's offhand comment as to hindsight was insufficient to support an inference of deficient performance; and (3) the defendant failed to show that prejudice resulted from counsel's alleged deficiency. *Sturgis v. State*, 282 Ga. 88, 646 S.E.2d 233 (2007).

Because trial counsel did not provide the defendant with ineffective assistance to the extent that the relevant strategic decisions made would not have affected the outcome of the trial, and counsel properly chose not to object to the court's failure to merge a kidnapping and false imprisonment conviction, as they were independent offenses, the defendant's motion for a new trial was properly denied. *Snelson v. State*, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

Defendant's motion for a new trial was properly denied since defense counsel was not ineffective in: (1) failing to investigate the victim's reputation for violence and introduce evidence of that victim's prior violent acts; (2) failing to investigate the defendant's medical records; (3) failing to investigate a state witness's convictions for crimes of moral turpitude and request an impeachment charge concerning that witness; (4) advising defendant not to testify; and (5) failing to present evidence or argument at sentencing. *Cross v. State*, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

Trial court properly denied the defendant's motion for a new trial on appeal from the defendant's convictions of child

molestation and aggravated child molestation because: (1) venue was adequately shown by the testimony of a single witness; (2) the defendant's trial counsel was not ineffective by failing to prepare for trial, investigate the case, subpoena important documents, interview key witnesses, and object to damaging testimony; and (3) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged shortcomings. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records, as: (1) testimony from the victim that the defendant gave the victim drugs before some of the sexual encounters between them was admissible as part of the *res gestae*; and (2) the medical records were generally consistent with the victim's testimony, and therefore no prejudice resulted from failing to subpoena them. *Mitchell v. State*, 287 Ga. App. 517, 651 S.E.2d 821 (2007).

In a battery prosecution, setting aside the defendant's failure to object to a second attorney's representation at trial, a denial from the defendant's first attorney of an alleged promise to represent the defendant after that counsel's suspension had expired gave the trial court sufficient grounds for finding that no such promise occurred, eliminating the defendant's denial of the right to counsel claim; moreover, inasmuch as the defendant failed to challenge the trial court's finding that the second attorney's representation was effective, the defendant was not entitled to a new trial. *Northington v. State*, 287 Ga. App. 96, 650 S.E.2d 760 (2007).

The defendant's trial counsel was not ineffective in failing to object when a medical examiner testified that the victim's death was a homicide and not an accident, and despite the defendant's contrary claim, the testimony was not an expression of the witness' opinion on the ultimate issue in the case, as: (1) counsel did not consider the testimony objectionable because there was no dispute that the

"manner" of the victim's death was a homicide, and such tactic was not unreasonable; (2) the ultimate issue for the jury to determine was whether the defendant acted with malice, in response to the victim's provocation, or whether self-defense was an issue; (3) counsel testified that an objection would have been in order had the medical examiner invaded the province of the jury by expressing the opinion that the homicide was a murder; and (4) the defendant failed to show any prejudice by the testimony presented. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007).

Because the defendant was not denied the effective assistance of trial counsel based on said counsel's failure to call certain witnesses, as the testimony that these witnesses would have provided would not have affected the outcome of the trial, and counsel was not ineffective to the extent that the defendant was denied the right to testify at trial, the trial court properly denied the defendant a new trial. *Finch v. State*, 287 Ga. App. 319, 651 S.E.2d 478 (2007).

Because trial counsel's decision not to object to statements that might have impugned the defendant's character was a tactical one, the trial court properly found that trial counsel was not ineffective; thus, the defendant was properly denied a new trial on those grounds. *Page v. State*, 287 Ga. App. 182, 651 S.E.2d 131 (2007).

Because the defendant was unable to establish prejudice resulting from trial counsel's alleged shortcomings, specifically that counsel was unprepared for trial, the defendant's ineffective assistance of counsel claim lacked merit; thus, the defendant was not entitled to a new trial on that ground. *Bradford v. State*, 287 Ga. App. 50, 651 S.E.2d 356 (2007).

Because the defendant did not claim below that trial counsel was ineffective for opening the door to impeachment, the defendant failed to timely raise this argument, and thus the claim was waived for purposes of appeal; as a result, the trial court did not err in denying the defendant's motion for a new trial on ineffective assistance of counsel grounds. *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Because counsels' advice against put-

ting the defendant on the stand was tactical, counsel made the strategic decision not to strike a challenged juror, and the record reflected the basis for counsels' objection and motion for a mistrial during the state's closing argument, the defendant's allegations of ineffective assistance of counsel lacked merit; thus, the defendant was not entitled to a new trial as a result. *Warner v. State*, 287 Ga. App. 892, 652 S.E.2d 898 (2007).

Because a trial counsel's decision not to request a jury charge on a lesser-included offense in order to pursue an all-or-nothing defense was a matter of trial strategy, and there was no indication that the defendant would have agreed to charges on lesser-included offenses, given that the defendant relied on a claim of innocence, counsel was not ineffective in failing to request an instruction on a lesser-included offense; thus, the defendant was not entitled to a new trial on this ground. *Davis v. State*, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

Because the defendant's trial counsel was not ineffective in presenting a defense and requesting jury instructions on the defendant's claim of innocence, and was authorized to forego objection to a challenged portion of the state's closing argument, the defendant's ineffective assistance of counsel claims lacked merit and did not warrant a new trial. *King v. State*, 282 Ga. 505, 651 S.E.2d 711 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally defi-

cient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense; thus, the evidence did not provide an adequate basis for the appellate court to conclude that the outcome of an amended motion for a new trial would have been different. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

Because the defendant's trial counsel was not ineffective in failing to call a witness who would have testified that the victim fabricated claims of molestation, given evidence that: (1) the witness did not inform counsel of the witness before trial; (2) counsel articulated valid reasons for not calling the witness; (3) counsel challenged the state's evidence, arguing that the claims were fabricated; and (4) the defendant failed to show that any prejudice resulted from counsel's actions, the trial court properly denied the defendant a new trial based on the ineffective assistance of counsel. *Noe v. State*, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

Because any deficiency in counsel's failure to object to an investigator's testimony regarding the hearsay statements of an informant did not prejudice the defendant's defense, the jury was likely to deduce that the defendant was on parole from the fact that a parole officer initiated a search, and pretermitted whether the defendant's response to the investigator's request to search constituted "pre-arrest silence," no deficiency existed in counsel's reasonable strategic decision that the evidence was consistent with the defense, the defendant's ineffective assistance of counsel claims lacked merit. *Cauley v. State*, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Because: (1) it was likely that a mistrial would not have been granted after a police investigator testified about past dealings with the defendant; and (2) trial counsel's failure to request a curative instruction

about the alleged improper injection of character evidence or question a witness about a note in which that witness recanted a statement amounted to reasonable trial strategy, the appeals court found that the defendant's claims of ineffective assistance of counsel lacked merit. Thus, a new trial based on those claims was unwarranted. *Head v. State*, 288 Ga. App. 205, 653 S.E.2d 540 (2007).

Because the defendant failed to show that any prejudice resulted from trial counsel's failure to investigate potential character witnesses and failure to "re-advise" the defendant of the right to testify following the state's introduction of rebuttal evidence, the defendant was not entitled to a new trial on these grounds. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Defendant's ineffective assistance of counsel claims did not warrant a new trial because counsel's trial tactics did not amount to ineffective assistance: (1) the defendant could not complain from a self-made choice to testify; (2) counsel's closing argument was not deficient; and (3) counsel could not be ineffective simply because another attorney might have used different language or placed a different emphasis on the evidence. *Davenport v. State*, 283 Ga. 171, 656 S.E.2d 844 (2008).

Because the trial court was entitled to believe counsel's testimony at the hearing on the motion for new trial that counsel advised the defendant of the right to testify at trial and that counsel met numerous times with the defendant, with ample opportunity to discuss all aspects of the case with counsel, the defendant's ineffective assistance of counsel claim in support of a motion for a new trial had to be rejected. *Warren v. State*, 283 Ga. 42, 656 S.E.2d 803 (2008).

Because the defendant failed to show that trial counsel was ineffective in failing to request jury voir dire to determine whether jurors saw the defendant wearing handcuffs, and because sufficient evidence supported the defendant's burglary conviction to make a directed verdict of acquittal unnecessary, a motion for a new trial was properly denied. *Brown v. State*, 289 Ga. App. 297, 656 S.E.2d 582 (2008).

Because: (1) the defendant failed to show that counsel was deficient in failing to impeach a cohort in the crimes charged with a prior felony conviction; (2) counsel made the strategic decision to restrict the scope of the cohort's cross-examination; and (3) the defendant could not show any prejudice resulting from the same, the defendant's ineffective assistance of counsel claim lacked merit. Thus, the defendant was not entitled to a new trial as a result of said claim. *Jones v. State*, 289 Ga. App. 219, 656 S.E.2d 556 (2008), cert. denied, 2008 Ga. LEXIS 381 (Ga. 2008).

Because the evidence showed that: (1) the defendant's trial counsel spent sufficient time investigating and preparing the case; (2) the defendant failed to present evidence of the victim's alleged "false reporting" conviction at the hearing on the motion for new trial or show how counsel's cross-examination of the victim on the same would have affected the outcome of the trial; and (3) trial counsel contacted each and every person the defendant identified as a witness, the defendant's motion for a new trial on grounds that said counsel was ineffective was properly denied. *Kilby v. State*, 289 Ga. App. 457, 657 S.E.2d 567 (2008).

On appeal from convictions on two counts of child molestation and one count of aggravated sexual battery, the trial court properly found that the defendant was not entitled to a new trial based on allegations of the ineffective assistance of defense counsel because: (1) the manner in which counsel handled alleged exculpatory evidence pertaining to a similar transaction witness and the cross-examination of said witness, was part of counsel's reasonable trial strategy; (2) the defendant's reciprocal discovery or due process rights were not violated; and (3) the existence of the information sought was known to the defendant, which could have been obtained with due diligence. *Ellis v. State*, 289 Ga. App. 452, 657 S.E.2d 562 (2008).

The defendant's ineffective assistance of counsel claim did not warrant a new trial in a prosecution for rape, kidnapping, aggravated stalking, and two counts of stalking; because of the limited nature of a challenged witnesses' trial testimony,

defense counsel made a strategic decision not to seek recusal of the trial judge, who was the brother of the challenged witness, and counsel discussed with the defendant the reasons for not seeking recusal. *Pirkle v. State*, 289 Ga. App. 450, 657 S.E.2d 560 (2008).

A new trial based on counsel's alleged ineffectiveness was unwarranted because the defendant made no affirmative showing that the purported deficiencies in trial counsel's representation in investigating a claim of possible jury tampering amounted to ineffective assistance of counsel and were not examples of a conscious and deliberate trial strategy. *Dowels v. State*, 289 Ga. App. 369, 657 S.E.2d 279 (2008).

Because: (1) the defendant failed to meet the burden of establishing that the state possessed favorable information, or that the trial's outcome might have been different if videotapes from the cameras on the vehicles of the two responding officers had been produced; and (2) counsel was not required to make an objection to the admission of similar transaction evidence where such would have been futile, the defendant was not entitled to a new trial as a result. *Hinton v. State*, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

Because the defendant failed to present any evidence of prejudice from trial counsels' alleged deficiency in failing to explore the possibility that the defendant's mental illness might have provided a viable trial defense, and that one counsel failed to adequately prepare the defendant for taking the witness stand, the trial court properly denied the defendant a new trial based on the ineffective assistance of counsel. *Icenhour v. State*, 290 Ga. App. 461, 659 S.E.2d 858 (2008).

A new trial based on counsel's alleged ineffectiveness was properly denied because the defendant's numerous claims of ineffective assistance of counsel lacked merit; the defendant failed to show that: (1) the number of different instructions sought; (2) any additional investigation or preparation; (3) an objection to evidence of the prior difficulties between the defendant and the victim, and request for a contemporaneous limiting instruction; and (4) a request for an instruction on a

defense not alleged, would have changed the outcome of the trial, and the tactical decision as to which defense to pursue was part of a reasonable trial strategy. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

Because the defendant failed to show that any prejudice resulted from trial counsel's alleged ineffectiveness in failing to discover and introduce the criminal record of one of the witnesses for the prosecution for impeachment purposes, a new trial was properly denied. *Rivers v. State*, 283 Ga. 108, 657 S.E.2d 210 (2008).

In prosecution against defendant on two counts of child molestation, because trial counsel was not ineffective in failing to request specific jury charge addressing alleged improper bolstering testimony, present any expert testimony which was not helpful to defense, and elicit available favorable evidence and impeach the victim's testimony, defendant's convictions of related offenses were upheld on appeal; thus, defendant was not entitled to new trial on grounds that trial counsel was ineffective. *Rouse v. State*, 290 Ga. App. 740, 660 S.E.2d 476 (2008).

As a defendant failed to raise an issue regarding the alleged bolstering of a victim by a witness for the state in the defendant's motion for a new trial based on the alleged ineffectiveness of trial counsel, the issue was not preserved for purposes of appellate review. *Carroll v. State*, 292 Ga. App. 795, 665 S.E.2d 883 (2008).

Trial court did not err in denying the defendant's motion for a new trial on the ground that defendant's trial counsel rendered ineffective assistance by failing to obtain an electronic enhancement of a videotape depicting a drug sale, which allegedly would have shown that defendant was not the perpetrator of the offense, because the defendant failed to show that the defendant was prejudiced as a result of trial counsel's failure to obtain an electronic enhancement of the videotape prior to trial since the enhanced images failed to create a reasonable probability that the defendant was not the perpetrator depicted in the images. Moreover, an undercover officer unequivocally identified the defendant as the perpetra-

tor based upon the officer's personal observations and independent memory of the defendant at the time of the drug sale, and although the defendant attempted to prove that another individual was the perpetrator depicted in the videotape's images, the defendant failed to proffer sufficient evidence in support of defendant's claim. *Faulkner v. State*, 304 Ga. App. 791, 697 S.E.2d 914 (2010).

Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel because trial counsel's decision not to object to a police officer's passing reference to the defendant's post-arrest silence was a valid exercise of reasonable professional judgment, the defendant failed to rebut the presumption that counsel performed within the wide range of reasonable professional assistance in failing to challenge hearsay testimony, counsel's defense strategy of implicating the codefendants was not unreasonable, and counsel did not fail to present evidence as promised in the counsel's opening statement. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Trial court did not err in denying the defendant's motion for new trial on the ground that trial counsel was ineffective in failing to object to statements the prosecutor made during closing argument because counsel did object, and defense counsel's objection was successful; while the defendant asserted that counsel should have further moved for a mistrial, such decisions generally fell within the ambit of strategy and tactics. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Trial court did not err in denying the defendant's motion for new trial on the ground that trial counsel was ineffective in failing to object to a question directed to an accomplice because counsel personally opened the line of questioning on cross-examination, and in the absence of counsel's testimony, it was presumed to be a strategic decision; having made that decision, trial counsel could not object, and because trial counsel succeeded in obtaining acquittal on the three most serious charges against the defendant that strongly supported the conclusion that the

assistance actually rendered by trial counsel fell within that broad range of reasonably effective assistance that members of the bar in good standing were presumed to render. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Trial court did not err in denying the codefendant's motion for new trial on the ground that trial counsel was ineffective in failing to object to testimony from one of the victims and a police officer regarding the codefendant's prior purchase of marijuana from one of the victims because drug use showed the codefendant's motive to rob a home where the codefendant believed illegal drugs and money would be found; an accomplice testified that the motive for the robbery was that the victims kept drugs and cash in the apartment and that the codefendant planned the robbery and knew that drugs and money were kept in the house. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because trial counsel's decision not to request the production of the duct tape that was used to bind the defendant when the defendant was allegedly kidnapped was not patently unreasonable because the duct tape itself was cumulative of evidence that was in-

troduced through the defendant's recorded police interview and trial counsel's cross-examination of a detective; even if it was assumed that trial counsel performed deficiently, the defendant proffered no evidence at the hearing on the defendant's motion for new trial that an analysis of the duct tape would have bolstered the defendant's alibi defense. *Buis v. State*, 309 Ga. App. 644, 710 S.E.2d 850 (2011).

Trial court did not err in denying the defendant's motion for new trial because trial counsel's failure to object to a detective's testimony did not amount to deficient performance since the testimony was not a statement of the victim's credibility or an invasion of the province of the jury; the testimony concerned the detective's reason for ending the interview with the victim and referring the victim to the Georgia Center of Child Advocacy, and even if the testimony that "a molestation incident occurred" did constitute improper bolstering, the defendant failed to show a reasonable probability that the testimony so prejudiced the defense as to affect the outcome of the trial. Furthermore, the motion was also properly denied because trial counsel's failure to object to the prosecutor's comments during closing argument did not constitute deficient performance; the comments of which defendant complained were permissible since the comments were the conclusion the prosecutor wished the jury to draw from the evidence and not a statement of the prosecutor's personal belief as to the veracity of a witness. *Strickland v. State*, 311 Ga. App. 400, 715 S.E.2d 798 (2011).

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a mo-

tor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge it, and the trial court did not err in denying the defendant's motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the alleged offense of "armed robbery" can be accomplished only via a taking from the person or immediate presence of another. *Patterson v. State*, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Trial court did not err when the court denied the portion of the codefendant's motion for new trial alleging ineffective assistance of trial counsel because the alleged deficiencies in trial counsel's performance were either without factual basis or were decisions made as matters of trial strategy. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Counsel not ineffective for alleged intoxication. — Trial court did not err in denying the defendant's motion for a new trial on the basis of ineffective assistance of counsel because the defendant failed to show that the defendant's trial counsel was actually intoxicated on the second morning of the trial and that the defendant's counsel's performance after consuming alcohol affected the outcome of the defendant's trial; nothing in the record showed that the trial court erred in finding that there were no deficiencies in counsel's performance on the second morning of the trial. *Long v. State*, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

Where ineffective counsel did not result in prejudice. — Defendant's ineffective assistance of counsel claim did not warrant a new trial because sufficient evidence of the defendant's intoxication was presented in the record, and the defendant failed to show prejudice resulting from trial counsel's failure to object to defendant's admission to having a prior DUI conviction, even though it was error

for trial counsel not to object. *Thomas v. State*, 288 Ga. App. 827, 655 S.E.2d 701 (2007).

A new trial was unwarranted because: (1) the decision not to present the defendant's love interest as an alibi witness was clearly strategic, and thus, could not serve as the basis for an ineffectiveness claim; and (2) counsel's alleged failure to specifically object to the victim's testimony on bolstering and not on leading and speculation grounds impermissibly expanded the enumerated error. *Scott v. State*, 288 Ga. App. 738, 655 S.E.2d 326 (2007).

While the defendant's trial counsel was ineffective in failing to object to that portion of the state's closing argument in which the prosecutor referenced a slain officer's funeral a week prior, as that fact had no relevance to the charges the defendant was facing, based on the overwhelming evidence of guilt, including the defendant's admission, the defendant's convictions for trafficking in cocaine and possession of cocaine with intent to distribute were upheld on appeal; thus, a new trial was properly denied. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

State found not to have committed discovery violation. — Absent any evidence of bad faith on the part of the state, or an order requiring production, the state did not fail to fully disclose all the information regarding the defendant's breath test results. Thus, the trial court did not err in denying the defendant either a mistrial or a new trial as a result. *Rosandich v. State*, 289 Ga. App. 170, 657 S.E.2d 255 (2008), cert. denied, 2008 Ga. LEXIS 380 (Ga. 2008).

Failure to establish Brady violation. — Trial court did not err in denying the defendant's motion for a new trial on the ground that the state withheld crucial impeachment evidence regarding an informant because the defendant failed to carry the burden of establishing a Brady claim; the defendant's trial counsel extensively questioned an agent about the informant's criminal history, and during the cross-examination of the agent, trial counsel elicited the fact that the informant had once been addicted to cocaine and again went through the informant's convictions,

introducing copies of the convictions for the jury's consideration. *Durham v. State*, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Absence of key portions of trial record supported verdict. — Because the appellant failed to supply the appellate court with the entire trial transcript in the record on appeal, but only included the pretrial motions and the opening statements at trial, without a complete transcript the court of appeals had to presume that the evidence supported the jury's verdict; thus, a new trial was not warranted. *Parekh v. Wimpy*, 288 Ga. App. 125, 653 S.E.2d 352 (2007), cert. denied, No. S08C0520, 2008 Ga. LEXIS 319 (Ga. 2008).

Deputy sheriff's communications with jury. — Defendant's motion for a new trial was properly denied, as the challenged communications between a deputy sheriff and the jury members were not improper, the deputy properly instructed the jurors to direct their questions to the judge, and the deputy's communications to the jury did not prejudice the defendant. *Jackson v. State*, 282 Ga. App. 612, 639 S.E.2d 403 (2006).

Juror impartial. — Trial court did not abuse its discretion in denying motion for new trial motion pursuant to O.C.G.A. § 5-5-25 after defendant was convicted of criminal charges arising from an incident involving an ex-girlfriend; the fact that one juror indicated that the juror's daughter went to school with the victim's daughter and the daughters had a sleepover a year earlier at the victim's house did not create actual juror partiality or circumstances that were inherently prejudicial to defendant's right to an impartial jury under Ga. Const. 1983, Art. I, Sec. I, Para. XI. *Sims v. State*, 276 Ga. App. 246, 622 S.E.2d 909 (2005).

Premitting whether a challenged juror would have been disqualified based on a relationship with the defendant, because the testimony from that juror at the new trial hearing did not reveal any bias for or against the defendant, or establish that the relationship affected the verdict, the defendant was not denied a fair and impartial trial. Moreover, even if the juror deliberately answered falsely, the defendant failed to show that a new trial was

warranted because that juror had an evil motive or acted otherwise as one of the twelve jurors than with the required impartiality. *Allen v. State*, 290 Ga. App. 604, 659 S.E.2d 900 (2008).

Polling of jurors reveal consensus. — Trial court properly denied defendant's motion for a new trial and entered final judgments of conviction on the jury's verdict finding defendant guilty of multiple child molestations even though defendant alleged multiple grounds for overturning the verdict, as the polling of the last juror was sufficient to establish that the verdict against defendant was unanimous since the juror said the guilty verdict against defendant was "her verdict now." That response showed, along with other jurors similar responses, that the verdict was unanimous and it thus did not matter that the juror answered in response to a question before that that the verdict had not been that juror's verdict. *Benefield v. State*, 264 Ga. App. 511, 591 S.E.2d 404 (2003).

Voir dire was not inadequate. — Trial court acted within the court's discretion in granting an insurance premium finance company's motion in limine to preclude an insured from mentioning irrelevant corporate affiliations of the company during the course of the trial in any address to the jury, and the court properly denied the insured's motion for new trial under O.C.G.A. §§ 5-5-23 and 5-5-25 because the voir dire was broad enough to ascertain the fairness and impartiality of the prospective jurors, and the insured was not prohibited from asking more general questions that could have ferreted out the potential bias the insured claimed was so critical since the only limitation placed on voir dire was a prohibition against asking any questions about any affiliation with the company, and the insured failed to explore other avenues open to the insured for detecting juror bias; a corporation was not the company's insurer, and the insured did not provide the trial court with proof of any direct, demonstrable financial stake by the corporation in the outcome of the case. *Floor Pro Packaging, Inc. v. AICCO, Inc.*, 308 Ga. App. 586, 708 S.E.2d 547 (2011).

Jury foreperson's alleged untruthfulness in voir dire. — Because the

defendant failed to present sufficient evidence to show that if the jury foreperson had given a truthful answer to counsel's question regarding whether any juror had ties to law enforcement, and that the foreperson would have been dismissed for cause, the defendant was not entitled to a new trial on this ground. *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

Because the defendant failed to show error by the record in order to support a claim that the trial court impermissibly communicated with the jury during the hearing on a motion for a new trial, the appeals court rejected that claim. *Thornton v. State*, 288 Ga. App. 60, 653 S.E.2d 361 (2007), cert. denied, 2008 Ga. LEXIS 283 (Ga. 2008).

Prejudicial statements made during voir dire. — Trial court erred in denying the defendant's motion for mistrial when prejudicial statements were made during voir dire because although a prospective juror stated that the juror was not sure if the defendant was the same person accused of raping his grandmother in a prior case, the state elicited more information from the juror, hereby providing the other prospective jurors with the name of another alleged rape victim in a crime for which the defendant was not on trial; the trial court did not undertake any measures to ascertain what, if any, impact the remark had on the panel's ability to decide the case, and the evidence was inherently prejudicial and deprived the defendant of the right to begin the trial with a jury free from even a suspicion of prejudgment or fixed opinion. *Bell v. State*, 311 Ga. App. 289, 715 S.E.2d 684 (2011).

Crying juror inadequate for motion for mistrial. — Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial after a juror started crying as the victim's widow and two other family members of the victim allegedly ran out of the courtroom crying during the state's closing arguments because contrary to the defendant's description of the scene during closing arguments, the trial court stated that the court did not adopt the defense attorney's recitation of what occurred. *Carter v. State*, 289 Ga. 51, 709 S.E.2d 223 (2011).

Grand jury composition. — The trial court did not err in failing to grant the defendant a new trial on the ground that the grand jury was composed of 25 people in violation of O.C.G.A. § 15-12-61(a), as the claim was waived, and the trial court found as a fact that the grand jury was properly comprised. *Daly v. State*, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); 553 U.S. 1039, 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

Failure to request jury charge. — Though defendant's counsel erred by failing to request a jury charge on good character evidence and such error amounted to a deficient performance of counsel, defendant's conviction for malice murder and the denial of a motion for a new trial was upheld on appeal; no prejudice resulted to defendant due to the deficiency in that the evidence of guilt was so overwhelming that, had the jury instruction been given, there was no likelihood that the outcome of the trial would have been different. *Lucas v. State*, 279 Ga. 175, 611 S.E.2d 55 (2005).

While the prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, convictions on said charges were not reversed merely because the trial court failed to charge O.C.G.A. § 24-4-6, as the defendant failed to request said charge; hence, the defendant's motion for a new trial was properly denied. *Rodriguez v. State*, 283 Ga. App. 752, 642 S.E.2d 705 (2007).

Because trial counsel made a strategic decision not to present a written request for a lesser-included misdemeanor obstruction charge given that the defendant decided to pursue an "all or nothing" defense, and, as a result, the trial court did not err in not charging the jury on misdemeanor obstruction, sua sponte, which would have undermined that defense, trial counsel was not ineffective in failing to request the charge; hence, the defendant was not entitled to a new trial on those grounds. *Owens v. State*, 288 Ga. App. 771, 655 S.E.2d 244 (2007), cert. denied, 2008 Ga. LEXIS 274 (Ga. 2008).

Improperly admitted evidence properly ruled out not grounds for

mistrial. — Trial court did not abuse its discretion in denying defendant's motion for a mistrial in defendant's shoplifting case as the trial court's action in immediately ruling out improperly admitted evidence and instructing the jury to disregard it meant a mistrial was not necessary to preserve defendant's right to a fair trial. *Bradford v. State*, 261 Ga. App. 621, 583 S.E.2d 484 (2003).

Trial counsel was not ineffective for failing to obtain copies of defendant's cell phone records, and the trial court did not err in denying defendant's motion for a new trial on this ground. According to the defendant, these records would have shown that calls were made from defendant's cell phone to the victim's father, rebutting the father's testimony that defendant would not talk to the father; however, defendant admitted at trial that defendant's co-workers would not allow defendant to speak with the victim's father. *Stanford v. State*, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

Evidentiary issues did not warrant new trial. — Burglary conviction was upheld on appeal, and thus, defendant was properly denied a new trial, as: (1) sufficient evidence was presented that the defendant entered the victim's home without permission with the intent to commit a theft therein; and (2) the state properly presented *res gestae* evidence, even if such improperly placed the defendant's character in evidence. *Meyers v. State*, 281 Ga. App. 670, 637 S.E.2d 78 (2006).

Because the defendant waived a confrontation clause, as well as any other constitutional objection, to testimony concerning a statement overheard from a woman fleeing the scene of the crime on appeal, and the victim's testimony, as well as the defendant's own admission, supported a robbery by intimidation conviction, such was upheld on appeal; hence, the trial court did not err in denying the defendant a new trial. *Jordan v. State*, 283 Ga. App. 85, 640 S.E.2d 672 (2006).

The trial court properly denied the defendant a new trial, given sufficient evidence that: (1) the defendant's convictions for malice murder and other related crimes were supported by the evidence; (2)

the jury properly decided against a voluntary manslaughter verdict based on said evidence; (3) evidentiary issues did not warrant a mistrial; (4) the state did not act in bad faith in failing to preserve potentially exculpatory evidence; and (5) no due process violation occurred by the admission of cumulative evidence. *Loneragan v. State*, 281 Ga. 637, 641 S.E.2d 792 (2007).

The trial court did not err in denying the defendant's motion for a new trial, as sufficient evidence supported the rape, aggravated sodomy, and incest convictions, similar transaction evidence was admitted for a proper purpose, and the imposition of a life imprisonment sentence as a recidivist child molester did not render O.C.G.A. § 16-6-4(b) an unconstitutional *ex post facto* law. *Williams v. State*, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

Because: (1) the defendant's convictions were supported by evidence of the defendant's confession to a friend and expert medical testimony as to how the victim died; (2) the defendant received ample notice of the specific deadly weapon allegedly used for purposes of the felony murder charge; and (3) the defendant failed to show that trial counsel was ineffective and a presumption of prejudice did not apply, the defendant was not entitled to a new trial. *Jones v. State*, 282 Ga. 47, 644 S.E.2d 853 (2007).

The trial court properly denied the defendant a new trial, as the state's commentary during opening and closing argument on the connection between illegal drugs and crime in the community was proper, no abuse of discretion resulted from the admission of the defendant's booking mug shot, and the state's identification witnesses could testify about their level of certainty in identifying the defendant. *Clark v. State*, 285 Ga. App. 182, 645 S.E.2d 671 (2007).

Because: (1) the defendant failed to support a defense of self-defense, given evidence that any imminent threat posed against the defendant had passed, the victim was shot in the head after a confrontation had ended, and the victim had retreated to her car and was being driven away at the time the fatal shot was dealt; (2) severance of the offense of aggravated

assault on a police officer and felony murder of the victim was not warranted; and (3) the defendant failed to prove that the state committed a Batson violation in peremptorily striking two jurors, the defendant's motion and amended motion for a new trial were properly denied. *Woolfolk v. State*, 282 Ga. 139, 644 S.E.2d 828 (2007).

Because sufficient evidence was supplied via the testimony from the child victim, and the witnesses who corroborated said testimony, to support the defendant's aggravated sexual battery and child molestation convictions, despite any alleged inconsistencies, the convictions were upheld as was the denial of the defendant's motions for an acquittal and a new trial. *Lilly v. State*, 285 Ga. App. 427, 646 S.E.2d 512 (2007).

Given sufficient evidence presented by the state of the defendant's involvement in the armed robbery and murder of the victim as a party to the crimes, no errors in the content and order of the jury charges, and the lack of evidence supporting the defendant's ineffective assistance of counsel claims, the trial court properly denied the defendant a new trial. *Pruitt v. State*, 282 Ga. 30, 644 S.E.2d 837 (2007).

An affirmation of the juvenile court's order terminating a parent's parental rights was ordered, as the parent failed to comply with the case plan outlined, and the parent's failure to obtain stable housing, continued financial instability, and prolonged unwillingness to address mental health issues showed that the parent's lack of parental care or control caused the children's deprivation; hence, the parent's motion for a new trial was properly denied. In the *Interest of J.M.N.*, 285 Ga. App. 203, 645 S.E.2d 685 (2007).

Because the jury was presented with sufficient evidence via a husband's deposition and trial testimony supporting its determination of the husband's monthly gross income, which included income from two landscaping businesses and a salary from the sheriff's department, which in turn supported a finding of special circumstances warranting an upward modification of child support, the husband was not entitled to a new trial; moreover, to the extent that any error in admitting the

husband's landscaping business bank statements could have resulted from the marks or highlights that were on pages sent with the jury, the husband's counsel induced such error by approving the pages beforehand. *Dyals v. Dyals*, 281 Ga. 894, 644 S.E.2d 138 (2007).

In a prosecution for statutory rape, the trial court properly denied the defendant a new trial, as: (1) the indictment adequately set forth a charge of felony statutory rape; (2) the evidence showed the defendant to be over 21 years old and more than three years older than the victim; (3) the trial court was not required to sentence the defendant for misdemeanor statutory rape, and in fact was precluded from doing so; and (4) the defendant failed to make a written request that the jury be charged on the law under O.C.G.A. § 24-4-6. *Attaway v. State*, 284 Ga. App. 855, 644 S.E.2d 919 (2007).

Because sufficient evidence was presented that the defendant physically assaulted an off-duty sheriff's officer prior to arrest and continued to resist and obstruct the officer's official duties thereafter, the defendant was properly denied an acquittal and a new trial; moreover, given that the trial court properly charged the jury on the obstruction offense, explaining that a person committed the offense by knowingly and willfully obstructing or hindering a law enforcement officer in the lawful discharge of that officer's official duties, nothing beyond such was required. *Helton v. State*, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

Because the overwhelming evidence presented against the defendant supported the convictions, and the defendant failed to assert a timely and contemporaneous objection to the prosecutor's opening statement comments, the trial court did not err in denying the defendant's motions for a new trial and a mistrial. *Brooks v. State*, 284 Ga. App. 762, 644 S.E.2d 891 (2007).

Rape, incest, child molestation, aggravated child molestation, and aggravated sodomy convictions were all upheld on appeal, given that: (1) the elements of child molestation and aggravated child molestation, including venue, were supported by the female victim's testimony;

(2) the trial court's charge on the mandatory presumption of consent was proper; as a result, the defendant was not entitled to a new trial. *Forbes v. State*, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

Because no reversible error resulted from excepting a prosecution witness from sequestration, the admission of certain recorded out-of-court statements by three witnesses and one of the codefendants, and the jury charge on impeachment, the defendant's felony murder and possession of a firearm during the commission of a felony convictions were upheld on appeal; hence, the trial court properly denied the defendant a new trial. *Warner v. State*, 281 Ga. 763, 642 S.E.2d 821 (2007).

In a premises liability action arising from a customer's slip and fall on a restaurant's premises, the trial court did not err in denying the customer's motion for a new trial, as: (1) a trash can did not obstruct the sidewalk the customer was walking on at the time of the fall, and there was no basis in the record to find that the restaurant negligently failed to keep its premises safe; (2) the customer had knowledge of the hazard equal or superior to the restaurant; (3) the customer could have discovered and avoided the hazard in the exercise of ordinary care; (4) there was no evidence that the restaurant had either actual or constructive knowledge of the hazard; (5) the trial court properly instructed the jury on the issue of constructive knowledge; and (6) there was at least some evidence to support a comparative negligence charge. *Compton v. Huddle House, Inc.*, 284 Ga. App. 367, 644 S.E.2d 182 (2007), cert. denied, 2007 Ga. LEXIS 515 (Ga. 2007).

Given the arresting officer's observations, the defendant's failure to maintain a lane of driving, the evidence presented surrounding the defendant's arrest, and the defendant's failed field sobriety and breath tests, sufficient evidence was presented to support the DUI convictions; thus, a new trial based on the insufficiency of the evidence was properly denied. *Trull v. State*, 286 Ga. App. 441, 649 S.E.2d 571 (2007).

Because sufficient evidence supported the defendant's convictions, a voluntary statement given to police did not violate

Miranda, the trial court properly charged the jury, the defendant waived error regarding a sequestration issue, and the imposition of a maximum sentence against the defendant as a recidivist was warranted, the trial court did not err in denying the defendant a new trial. *Bryant v. State*, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

The trial court did not err in denying the defendant's amended motion for a new trial, as defense counsel's trial strategy did not amount to ineffective assistance, the victim's testimony and surrounding evidence supported an aggravated sexual battery conviction, and any error resulting from the trial court's instruction on prior consistent statements was harmless. *Boyt v. State*, 286 Ga. App. 460, 649 S.E.2d 589 (2007).

On appeal from a conviction for two counts of aggravated child molestation, the trial court did not err in denying the defendant a new trial, as no abuse of discretion resulted in excluding evidence that one of the victims made prior false accusations of sexual abuse against an older cousin, because the evidence presented a credibility issue for the trial court to resolve in analyzing whether there was a reasonable probability of falsity. *Roberts v. State*, 286 Ga. App. 346, 648 S.E.2d 783 (2007).

The defendant's aggravated assault and robbery convictions were upheld on appeal, as evidence including the defendant's admission and flight from the scene authorized the jury to conclude that the defendant went to an apartment complex intending to participate in the robbery, and in fact participated in the robbery by acting as a lookout and an additional show of force; hence, the defendant's motion for a new trial was properly denied. *Millender v. State*, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

Because: (1) the defendant's statement was admissible; (2) probable cause supported the issuance of a search warrant; (3) the indictment was sufficient; (4) jury selection was non-discriminatory; (5) relevant evidence was properly admitted; (6) the best evidence rule was not violated; and (7) instructions on voluntary man-

slaughter, involuntary manslaughter, and accident were unwarranted, the defendant's murder conviction was supported by the evidence; thus, a new trial was properly denied. *Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

Trial court did not err in denying the defendant's motion for a new trial on grounds that a refusal to submit to voluntary field sobriety tests was testimonial in nature, and thus subject to the Fifth Amendment protection against self-incrimination, as a refusal to submit to the tests was not testimonial in nature, and the mere fact that the defendant refused to submit to a blood test was not subject to the privilege against self-incrimination since no impermissible coercion was involved, regardless of the form of refusal. *Ferega v. State*, 286 Ga. App. 808, 650 S.E.2d 286 (2007), cert. denied, 129 S. Ct. 195, 172 L.Ed.2d 140 (2008).

Trial court properly denied the defendant's motion for a new trial, and an aggravated assault conviction was upheld on appeal, as the state was not required to show that the defendant expressed an intent to rob or declared a purpose to carry that intent into effect, for the jury to arrive at the conclusion that such was the defendant's intent; moreover, the defendant's intention could be gathered from the circumstances of the case as proved, and in seeking the motives of human conduct, inferences and deductions could properly be considered where they flowed naturally from the facts proved. *Squires v. State*, 286 Ga. App. 141, 648 S.E.2d 696 (2007).

Given the evidence supporting the defendant's aggravated child molestation conviction, including that: (1) the defendant sodomized the victim; (2) witnesses knew that the defendant had an interest in performing oral sex; and (3) the trial court properly limited the defendant's cross-examination to only relevant matters, the conviction was upheld on appeal and the trial court did not err in denying the defendant a new trial. *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

In its order denying the defendant a new trial, the trial court correctly ruled that the defendant's motion to suppress

was moot because no tangible physical evidence was admitted at trial. *Maxwell v. State*, 285 Ga. App. 685, 647 S.E.2d 374 (2007).

Because the "direct sequencing" method of the mitochondrial DNA analysis used by the crime lab was properly used in prosecuting the defendant for murder, and a spontaneous outburst was admissible as a non-custodial and voluntary statement, a conviction for malice murder, and resulting sentence, were affirmed on appeal; hence, the defendant was properly denied a new trial. *Vaughn v. State*, 282 Ga. 99, 646 S.E.2d 212 (2007).

Because: (1) the defendant's noncustodial and spontaneous remark to an officer was admissible; (2) the defendant's mug shot did not erroneously place character in issue; and (3) the victim was conscious of the crime as the crime was being committed, a jury charge on theft by taking as a lesser-included offense of robbery by sudden snatching was not required, and a new trial was unwarranted. *Bettis v. State*, 285 Ga. App. 643, 647 S.E.2d 340 (2007), cert. denied, No. S07C1535, 2007 Ga. LEXIS 862 (Ga. 2007).

Given that both parties to a property dispute involving a house testified as to the home's value, including the appraisals, probative and non-hearsay evidence as to the value existed to support the jury's damages award such that the trial court erred in concluding otherwise and awarding a new trial on this basis. *Perry v. Perry*, 285 Ga. App. 892, 648 S.E.2d 193 (2007).

Because the state presented sufficient identification and circumstantial evidence linking the defendant to a burglary, including similar transaction evidence of a prior burglary, and in response to trial counsel's objection to the state's comment that the defendant was under the influence of drugs or alcohol at the time of the offense, the defendant did not object to the curative instruction given, thus, the defendant's motion for a new trial was properly denied. *Bryant v. State*, 285 Ga. App. 508, 646 S.E.2d 717 (2007).

Because: (1) the trial court did not err in giving the defendant's requested jury charge containing "level of certainty" lan-

guage; (2) the defendant's spontaneous outbursts were properly admitted; and (3) a mistrial based on comments made regarding the defendant's decision to remain silent was not warranted, a felony murder conviction and resulting sentence were upheld on appeal; thus, the defendant was not entitled to a new trial. *Tennyson v. State*, 282 Ga. 92, 646 S.E.2d 219 (2007).

Based on trial counsel's testimony at a hearing on the defendant's motion for a new trial, and evidence that both counsel and the defendant extensively discussed the pros and cons of having a jury hear the case, sufficient extrinsic evidence showed that the defendant knowingly, voluntarily, and intelligently waived any right to a trial by jury. *Whitaker v. State*, 286 Ga. App. 143, 648 S.E.2d 396 (2007).

In a negligence action seeking damages for a disabling injury filed against a property owner by a friend who assisted the owner in building a fence, because the evidence supported a verdict against the friend, and the trial court's various evidentiary rulings regarding: (1) the admission of evidence under both the medical records and business records exceptions to the hearsay rule; (2) the admission of evidence regarding the parties' friendship; (3) the impeachment of the friend's credibility; (4) the opening statement presented by the owner's counsel; and (5) the use of a leading question regarding the friend's use of Oxycontin, did not support a different result, the friend was not entitled to a new trial or judgment notwithstanding the verdict. *Imm v. Chaney*, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

The fact that one of the victims was told that the first defendant had a gun, believed such, became frightened as a result, and hurriedly gave the first defendant the cash demanded, amounted to sufficient circumstantial evidence from which the jury could find that the victim reasonably believed an offensive weapon was being used in the robbery; hence, the evidence was sufficient to sustain the armed robbery convictions of both defendants and uphold the denial of their motion for a new trial on this ground. *Richard v. State*, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

While the state conceded that it violated the Bruton rule by referring to the codefendant's comment in its opening statement, because neither of the defendants showed any harm by the error, said error was deemed harmless; moreover, given that the evidence, including eyewitness identification, was overwhelming, the trial court did not err in denying a new trial on this ground. *Richard v. State*, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

Because: (1) an indictment adequately charged the defendant with aggravated assault; (2) sufficient evidence supported the charge; (3) similar transaction evidence was admitted for a proper purpose; and (4) defense counsel's alleged omissions would not have affected the outcome and therefore did not amount to the ineffective assistance of counsel, the trial court properly denied the defendant a new trial. *May v. State*, 287 Ga. App. 407, 651 S.E.2d 510 (2007).

Because the trial judge took the appropriate curative steps in denying an opposing driver's motions for both a mistrial and a new trial after the suing driver made an inadvertent reference to insurance, including rebuking the suing driver and issuing a curative instruction, the court did not abuse its discretion in denying the opposing driver's motions; moreover, the appeals court could not conclude that the opposing driver suffered any wrong or oppression as a result of the trial court's orders. *Defusco v. Free*, 287 Ga. App. 313, 651 S.E.2d 458 (2007).

Because sufficient evidence was presented via the testimony of the victim regarding the defendant's attack with a screwdriver, which was corroborated by the defendant's own admissions at trial, the defendant's simple battery conviction was upheld on appeal and a new trial was unwarranted; moreover, the defendant's characterization of the incident as one involving mutual argument did not in and of itself justify the actions. *Rainey v. State*, 286 Ga. App. 682, 649 S.E.2d 871 (2007).

In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then

denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict, as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. *Dover v. Higgins*, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 237 (Ga. 2008).

Because the state's evidence sufficiently showed the first defendant's joint constructive possession of methamphetamine beyond mere spatial proximity, and the first defendant's act of testifying for the state without a promise of leniency or immunity did not unfairly prejudice the second defendant at the expense of that defendant's constitutional right not to testify, the trial court did not err in denying both defendants a new trial. *Herberman v. State*, 287 Ga. App. 635, 653 S.E.2d 74 (2007).

Despite the defendant's claim that the state failed to disprove a claim of self-defense, the appeals court upheld the defendant's aggravated assault conviction, because sufficient evidence was presented by the state to allow the jury to decide that the defendant's act of stabbing the weaponless victim amounted to excessive force. Thus, the defendant's motion for a new trial on the issue was properly denied. *Richards v. State*, 288 Ga. App. 814, 655 S.E.2d 690 (2007).

Given the overwhelming evidence of the defendant's guilt, including identification evidence from the victim and five other eyewitnesses, and the fact that none of the defendant's 21 ineffective assistance of counsel claims were sufficient enough to have led to a different outcome at trial, the defendant's convictions were upheld on appeal. Thus, an acquittal and a new trial were properly denied. *Ruffin v. State*, 283 Ga. 87, 656 S.E.2d 140 (2008).

The trial court properly denied the defendant a new trial because: (1) the trial court's admission of cash invoices and a jail inventory list was not improper; (2) the alleged misidentification evidence was

irrelevant, given the overwhelming evidence of the defendant's positive identification; and (3) an ineffective assistance of counsel claim was abandoned, and otherwise, even if it was not abandoned, the appeals court held that the claim lacked merit. *Bennett v. State*, 289 Ga. App. 110, 657 S.E.2d 6 (2008).

Because: (1) the testimony of two witnesses, as well as that of the defendant, sufficiently established the element of venue; and (2) the trial court gave complete instructions on the defendant's defense of justification and self-defense, and thus, a charge on mistake of fact was not warranted, there was no reason to reverse the defendant's convictions of aggravated assault and possession of a firearm during the commission of a felony. Thus, the defendant's motion for a new trial was properly denied. *Gaines v. State*, 289 Ga. App. 339, 656 S.E.2d 871 (2008), cert. denied, 2008 Ga. LEXIS 379 (Ga. 2008).

In a contract dispute between a homeowner and a construction contractor hired to finish the homeowner's unfinished basement, the Court of Appeals of Georgia erred by reversing the trial court's denial of the homeowner's motion for a new trial because there was some evidence supporting the jury's finding that the contract between the parties was not so uncertain as to be unenforceable. *Reebaa Constr. Co. v. Chong*, 283 Ga. 222, 657 S.E.2d 826 (2008).

Despite waiving error regarding a show up identification, because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions, as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus, new trial was properly denied. *Carr v. State*, 289 Ga. App. 875, 658 S.E.2d 419 (2008).

In light of needs of parent's two children, need for a secure and stable home, and their physical, mental, emotional, and moral condition, juvenile court was authorized to infer from that parent's past conduct that improvements made were insuf-

ficient to overcome reasons in support of court's termination of parental rights order, and that this was in the best interest of the children involved; thus, that parent was properly denied a new trial. In the Interest of P.K.V.G., 289 Ga. App. 799, 658 S.E.2d 416 (2008).

While defendant made out a prima facie case of racial discrimination regarding state's use of three peremptory strikes, sufficient race-neutral reasons existed for those strikes; thus, given court's jury charges and recharge to the jury, its responses to questions from the jury, and waiver of improper bolstering objection on appeal, defendant's aggravated assault and armed robbery convictions were upheld on appeal, as was court's denial of motion for a new trial. *LeMon v. State*, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial because an officer's hearsay statement that the defendant was a narcotics distributor was in response to a question, and there was nothing in the record to suggest that the statement was intentionally elicited by the state; other properly admitted evidence of similar transactions showed that the defendant had two prior convictions for selling crack cocaine to the same undercover agent involved in the case, essentially rendering the hearsay statement cumulative. *Robertson v. State*, 306 Ga. App. 721, 703 S.E.2d 343 (2010).

Trial court did not abuse the court's broad discretion in denying the defendant's motion for a mistrial because the trial court carefully considered the motion, offered to give a curative instruction, which the defendant declined, and determined that the testimony of the defendant's girlfriend was not harmful enough to warrant a mistrial. *Fox v. State*, 289 Ga. 34, 709 S.E.2d 202 (2011).

Trial court did not err in denying the defendant's motion for new trial, which was based upon the defendant's claim that the prosecutor's admonishment of the sole defense witness deprived the defendant of due process because the defendant did not show that the prosecutor's conduct dissuaded a defense witness from testifying or that the prosecutor induced materially

less favorable testimony; the witness testified and did so in the defendant's favor, when the witness took the stand the witness did not invoke the Fifth Amendment and did not otherwise refuse to answer any question posed to the witness, and the defendant's lawyer made no attempt to show that the defense witness had made the purported prior inconsistent statement, that the cocaine at issue, in fact, had belonged to the witness, acknowledging at the new trial hearing that counsel simply had made a strategic decision not to ask the witness that question. *Terry v. State*, 308 Ga. App. 424, 707 S.E.2d 623 (2011).

Trial court did not abuse the court's discretion by refusing to declare a mistrial because the prosecutor's remarks during closing argument did not deprive the defendant of a fair trial since the prosecutor's remarks did not insinuate that the defendant had attempted to kill any of the officers involved in the case, but instead, the remarks related, in part, to the defendant's obviously precarious situation given the investigator's response to the investigator's encounter with the defendant, namely, drawing the investigator's gun; after being cautioned by the trial court that the wide latitude afforded counsel during closing argument was not boundless, the prosecutor did not revisit the point concerning police officers but turned to the more narrow encounter between the defendant and the victim, which gave rise to the aggravated assault count. *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Trial court did not err in denying the defendant's motion for mistrial on the ground that certain testimony was beyond the scope of the state's pre-trial notice because the evidence was essentially cumulative of the witness's testimony that the defendant pointed a pistol at the witness, and it was highly probable that the testimony did not contribute to the verdicts given the weight of the evidence implicating the defendant; it was not clear from the witness's testimony whether the defendant's display of the defendant's pistol and the defendant's query whether the witness was "still brave" was so closely tied to the defendant's act of pointing the

defendant's pistol at the witness that the notice provided sufficient particulars of the incident such that the defendant's defense could not have been harmed by the failure to provide more specific information. *Pineda v. State*, 288 Ga. 612, 706 S.E.2d 407 (2011).

Trial court did not err when the court denied the defendant's motion for mistrial or for new trial following the testimony of an eyewitness to the shooting because a curative instruction preserved the defendant's right to a fair trial and, along with the witness's subsequent admission that the witness had never seen the defendant dealing drugs, was sufficient to counter any alleged harm caused by the witness's comment. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Trial court did not err in denying the defendant's motion for mistrial because the prosecutor's opening statement, which informed the jury that although the jury could hear a claim that the defendant and the codefendant were carjacked and forced to try to elude the police, the evidence would show that there were only two occupants in the vehicle that led police on the high-speed chase, referred to a statement by the defendant and not the codefendant and did not inculcate either the defendant or the codefendant; therefore, the defendant's Sixth Amendment right to confront witnesses was not violated. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Trial court did not err in denying a patient's motion for a new trial after a jury returned a verdict in favor of a doctor in the patient's medical malpractice action because neither the doctor nor the doctor's expert attempted to establish the applicable standard of care through their personal practices in violation of a motion in limine that prohibited the parties from using the personal practices of expert witnesses to establish the applicable standard of care. *Dendy v. Wells*, 312 Ga. App. 309, 718 S.E.2d 140 (2011).

Slides shown during prosecutor's opening argument. — Trial court did not deprive the defendant of a fair trial by failing to declare a mistrial sua sponte after the prosecutor showed the jury slides during the prosecutor's opening

statement because when the defendant objected, the trial court took immediate corrective action, ordering that the slides be taken down, and the defendant did not seek additional relief in the form of a curative instruction or a mistrial; the trial court did not abuse the court's discretion in concluding that the slides were inappropriately argumentative for opening statement, and the trial court instructed the jury before opening statements and again after the close of the evidence that the prosecutor's opening statements were not evidence. *Dolphy v. State*, 288 Ga. 705, 707 S.E.2d 56 (2011).

Issue of witness credibility did not warrant a new trial. — Despite the defendant's challenge to the sufficiency of the evidence as dependent on the trustworthiness of the principal state witness, who was a recidivist drug offender, as lacking in credibility, because the appeals court did not decide issues of witness credibility, this allegation did not warrant a new trial. *Head v. State*, 288 Ga. App. 205, 653 S.E.2d 540 (2007).

Because: (1) the defendant was not in custody when the challenged statements to a polygraph examiner were made; (2) the intent element of simple battery or simple assault was not inconsistent with the mens rea required for a charge of aggravated assault; and (3) a sufficiency challenge posed against a conviction for involuntary manslaughter was rendered moot, as such merged with an aggravated assault conviction for the purposes of sentencing, a new trial was properly denied. *Ramirez v. State*, 288 Ga. App. 249, 653 S.E.2d 837 (2007).

Because: (1) the trial court did not err in denying a patient's requested charge on the exercise of the requisite skill and care required of a physician, as the charge given by the court gave a full and correct statement of the law regarding the care and skill required of a physician and the proof required to support a medical malpractice claim; and (2) no abuse of discretion resulted from the trial court's refusal to strike a challenged defense expert's testimony, as a question of fact existed as to whether the expert applied the appropriate standard, and it was up to the jury to weigh this testimony and determine if

the testimony met the standard under the court's charge, the patient was properly denied a new trial. *West v. Breast Care Specialists, LLC*, 290 Ga. App. 521, 659 S.E.2d 895 (2008).

Nonresponsive answer by accomplice did not amount to mistrial. — Trial court did not err by denying the defendant's motion for mistrial with respect to a nonresponsive answer by an accomplice when the accomplice was asked on direct examination whether the accomplice had a conversation with defendant about a pistol in defendant's possession on the day of the shooting because a nonresponsive answer that impacted negatively on the defendant's character did not improperly place the defendant's character in issue; moreover, the defendant declined the trial court's offer to give a curative instruction with regard to the statement. *Lewis v. State*, 287 Ga. 210, 695 S.E.2d 224 (2010).

Waiver of Fourth Amendment rights due to parole status. — Trial court erred in granting the defendant's motion for a new trial, and then granting a motion to suppress the evidence seized after an automobile search, given that law enforcement had reliable information that the defendant was transporting drugs as: (1) the defendant was on parole, and that as a condition thereof, had specifically consented to a warrantless search; (2) the information received from the informant about the defendant's actions was reliable; and (3) no evidence was presented that the officers acted in bad faith or to harass the defendant. *State v. Cauley*, 282 Ga. App. 191, 638 S.E.2d 351 (2006), cert. denied, 2007 Ga. LEXIS 148 (Ga. 2007).

Effect on motion for new trial of vacation of prior judgment. — While sufficient evidence of the defendant's criminal intent supported both an aggravated battery and reckless conduct conviction, and the latter was vacated based on the doctrine of merger, because no other evidence was presented supporting the defendant's amended motion for a new trial, such was properly denied. *Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

Motion for new trial properly denied. — Trial court properly denied the

defendant's amended motion for a new trial, as: (1) the defendant waited too long to assert a constitutional speedy trial violation and failed to show prejudice from any delay; (2) similar transaction evidence was properly admitted; and (3) two counts of child molestation did not merge for the purposes of sentencing. *Parker v. State*, 283 Ga. App. 714, 642 S.E.2d 111, cert. denied, 552 U.S. 995, 128 S. Ct. 496, 169 L.Ed.2d 347 (2007).

It was not error for the trial court to deny the defendant's motion for new trial on the ground of inordinate appellate delay because the defendant provided no evidence of prejudice arising from the delay but only speculated that if a new trial were granted, some witnesses would not be available; in addition to the defendant's failure to introduce evidence regarding any such witnesses, the defendant did not advance any argument that the appeal had been hampered by the delay in any way. *Pineda v. State*, 288 Ga. 612, 706 S.E.2d 407 (2011).

Intent element established. — Trial court properly denied the defendant's motion for a new trial on grounds that the state failed to prove that the defendant intentionally threatened two deputies the defendant forced off the road with a car, given evidence that prior to driving directly at the deputies, the car was being used offensively toward others by forcing those individuals off the road, and thereafter, in driving toward the two deputies at 90 miles per hour, a jury could infer that the defendant intended to threaten the deputies in hopes of forcing them from the road. *Adams v. State*, 280 Ga. App. 779, 634 S.E.2d 868 (2006).

Evidence sufficient. — Jury was entitled to find the defendant guilty of aggravated assault, charged in the indictment "with the intent to rob," based on the corroboration of the defendant's admission to going on a "lick," which meant to go find someone to rob, and that the defendant knew what a passenger was going to do when that passenger reached out of the car window in an attempt to snatch the elderly victim's purse, resulting in the victim being struck by the car and falling to the ground; hence, the trial court did not err in denying the defendant's

amended motion for a new trial. *Jackson v. State*, 281 Ga. App. 506, 636 S.E.2d 694 (2006).

Because the defendant's admission to possessing MDMA was direct evidence supporting guilt, and the admission served as a direct connection to the contraband, the trial court did not err in denying the defendant's motion for a new trial based on the insufficiency of the evidence. *Barrino v. State*, 282 Ga. App. 496, 639 S.E.2d 489 (2006).

Because: (1) the evidence presented by the state against the defendant was sufficient to support the charges of armed robbery, hijacking a motor vehicle, possession of a firearm during commission of a felony, and aggravated assault with a deadly weapon; (2) separate convictions for armed robbery and hijacking a motor vehicle did not violate double jeopardy; (3) the state properly asked leading questions of its witness; and (4) counsel was not ineffective in failing to file a futile suppression motion, the trial court properly denied the defendant's motion for a new trial. *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Because evidence existed that the defendant was present when the crimes charged were committed, and the jury could infer a shared criminal intent with that of the actual perpetrator from the defendant's conduct before and after the crimes were committed, the evidence was sufficient to authorize the defendant's convictions as a party to those crimes. *Hill v. State*, 281 Ga. 795, 642 S.E.2d 64 (2007).

An officer's description of the defendant's speech, behavior, bloodshot eyes, odor, performance on the field sobriety tests, and the result of the alco-sensor test, when coupled with the defendant's own testimony, were sufficient to authorize a jury to convict the defendant of driving under the influence of alcohol to the extent of being a less safe driver; thus, the trial court properly denied the defendant a new trial. *Renkiewicz v. State*, 283 Ga. App. 692, 642 S.E.2d 384 (2007).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault with a deadly weapon, possession of a firearm during the commission of a felony, and possession of a

firearm by a convicted felon beyond a reasonable doubt, and the trial court properly denied the defendant's motions for directed verdict and new trial because the jury could have determined that a witness's testimony provided corroboration for the codefendant's identification of the defendant; further corroboration for the testimony of the witness and the codefendant was provided by a neighbors' description of the robbery and shooting, by the description of the codefendant's wife of the codefendant's demeanor and behavior that day, and by physical evidence found at the scene. *Williamson v. State*, 308 Ga. App. 473, 708 S.E.2d 57 (2011).

Jury instructions proper. — As the jury was properly instructed as to the charged offense of criminal attempt to obtain possession of a controlled substance by forgery, the defendant did not request that the word "forgery" be defined, and the defendant did not take the position that forgery was a lesser-included offense of the crime of attempting to obtain possession of a controlled substance by forgery, a new trial was properly denied; further, the term "forgery," was not so obscure or technical that it required the court to sua sponte define it for the jury. *Sosebee v. State*, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

Because the jury instructions issued by the trial court were neither confusing nor misleading, and provided full and fair instruction on the issues in the case, specifically, as to the value of the stolen property the defendant possessed, the trial court did not err in denying the defendant's motion for new trial on this ground. *Price v. State*, 283 Ga. App. 564, 642 S.E.2d 191 (2007).

Trial counsel was not ineffective for failing to request in writing a jury instruction that excluded a statement that witnesses were presumed to speak the truth unless impeached, and the trial court did not clearly err in denying defendant's motion for new trial on this ground. The court charged the jury that it could consider a number of factors, including a witness's manner of testifying, their means and opportunity for knowing the facts to which they testified, and the probability or improbability of their testimony.

Stanford v. State, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

Because the trial court properly instructed the jury on the law regarding the use of prior consistent statements and on the defense of accident, the appeals court lacked any reason to reverse the defendant's aggravated battery and cruelty to children convictions; thus, the trial court properly denied the defendant's motion for a new trial. *Watkins v. State*, 290 Ga. App. 41, 658 S.E.2d 812 (2008).

Instruction cured reading of wrong indictment. — Because state presented sufficient evidence showing defendant's involvement in sale of cocaine and the sale of cocaine within 1,000 feet of public housing project as party to the crimes, and because judge's instruction and explanation after reading wrong indictment to jury at trial cured any error, defendant's convictions were upheld on appeal, and mistrial based on the latter was properly denied; moreover, defendant was properly denied a new trial. *Walker v. State*, 290 Ga. App. 749, 660 S.E.2d 844 (2008), cert. dismissed, 2008 Ga. LEXIS 776 (Ga. 2008).

Due process rights for chemical testing. — Trial court properly denied the defendant's amended motion for a new trial, holding that the administration of breath tests pursuant to Ga. Comp. R. & Regs. 92-3-.06(12)(b) did not violate the due process clause under both U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. I, given that: (1) said claim was raised for the first time within the new trial motion, and was thus untimely; (2) the defendant had an alternative remedy under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1; (3) the defendant failed to show that the Division of Forensic Sciences (DFS) eliminated meaningful procedures for conducting breath tests when it promulgated the rule; and (4) the techniques and methods approved by DFS were sufficient to ensure fair and accurate testing. *Palmaka v. State*, 280 Ga. App. 761, 634 S.E.2d 883 (2006).

No prosecutorial misconduct during closing. — Prosecutor's statements during closing argument were within the wide leeway granted to counsel to argue

all reasonable inferences from the evidence pursuant to O.C.G.A. § 17-8-75(c), including that a former girlfriend whom the defendant forced to purchase a gun was fearful of the surroundings and that another girlfriend was a battered woman, such that there was no cause to grant a new trial. *Varner v. State*, 285 Ga. 300, 676 S.E.2d 189 (2009).

Trial court did not err in denying the defendant's motion for mistrial on the ground that the state made improper arguments in closing because the challenged comments referred to evidence in the case, which was the defendant's refusal to submit to testing and other manifestations of impairment, and, thus, were not improper under O.C.G.A. § 17-8-75; considering the strength of the state's evidence, it was highly unlikely that the prosecutor's closing argument contributed to the guilty verdict. *Crusselle v. State*, 303 Ga. App. 879, 694 S.E.2d 707 (2010).

Defendant was not entitled to a new trial based upon the prosecutor's misstatement of the evidence during closing arguments because the defendant did not seek a ruling on the defendant's objection nor any court action to remedy the alleged error. *Williams v. State*, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not err by refusing to declare a mistrial after the prosecutor stated in the course of making an objection during the defense's closing argument that the state had never furnished the accomplice's custodial statement to another accomplice because the trial court properly noted at the time the statement was made that the jury had to consider the evidence adduced on that point, and the court had also previously instructed the jury that statements of counsel did not constitute evidence. *Lewis v. State*, 287 Ga. 210, 695 S.E.2d 224 (2010).

Trial court did not abuse the court's discretion in denying the codefendant's motion for new trial because when viewed in the context in which it was made the prosecutor's argument referencing magic and misdirection and request that the jury focus on the evidence did not exceed the wide latitude permitted in closing argument. *Rainly v. State*, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial on the ground that the prosecutor misled the jury during closing argument because the trial court took action sufficient to prevent the prosecutor's misstatement from misleading the jury; the prosecutor immediately restated the principle of law using the proper language, and the trial court gave complete and correct instructions to the jury. *Long v. State*, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

Trial court did not err by denying the defendant's motion for mistrial based on the prosecutor's use of the term "confessed" during closing argument because the prosecutor's characterization of the defendant's statement to a detective was not an extraneous matter outside the facts legitimately produced during trial; the trial court instructed the jury that the evidence did not include opening and closing statements of the attorneys, and the defendant failed to show that the defendant was prejudiced or harmed by the prosecution's characterization of the statement. *Arnett v. State*, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Trial court did not abuse the court's discretion in denying the defendant a mistrial because there was no indication that either the jury or the trial court heard the prosecutor's remark that the defendant was "swaying" during the defendant's horizontal gaze nystagmus test nor was the remark recorded; the trial court explained to the jury, both in the court's preliminary and closing instructions, that evidence consisted only of witness testimony and exhibits and that the jurors were to decide the case for themselves, based solely on the testimony heard from the witness stand and any exhibits admitted into evidence. *Travis v. State*, No. A11A1941, 2012 Ga. App. LEXIS 178 (Feb. 22, 2012).

No prosecutorial misconduct in monitoring telephone calls. — Trial court did not err when the court denied the defendant's motion for new trial on the basis of prosecutorial misconduct because the trial court determined that while there was prosecutorial misconduct since the county district attorney's office had access to the jail's telephone monitoring

system without ensuring the blockage of inmate communications with their attorneys, the court also determined that the extent of misconduct was not sufficient to warrant granting a new trial to defendant specifically; the prosecutor assured the defendant's trial counsel that no one working on the defendant's case had listened to any of appellant's telephone calls. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Claims of juror misconduct. — Because the jurors testified at the motion for new trial hearing that deliberations did not begin before the close of the evidence, and even a dismissed juror, who allegedly communicated to trial counsel's paralegal that such had occurred, denied making such a statement, the defendant was not entitled to a new trial based on juror misconduct. *Meeker v. State*, 282 Ga. App. 77, 637 S.E.2d 806 (2006).

The trial court properly denied the defendant a new trial because: (1) a mistrial based on an allegation of juror misconduct was unwarranted, given the lack of evidence that a dismissed juror impermissibly influenced other jurors by discussing a conversation that the dismissed juror had with the victim; and (2) the trial court dismissed the juror within minutes after the alleged inappropriate contact. *Lawrence v. State*, 289 Ga. App. 163, 657 S.E.2d 250 (2008).

Trial court did not abuse the court's discretion by refusing to declare a mistrial on the ground that an alternate juror made improper comments about the defendant's guilt because the record disclosed no basis upon which to conclude that the misconduct was so prejudicial as to deny the defendant due process; the trial court thoroughly questioned each individual juror under oath about what he or she had heard and whether he or she had the ability to remain fair and impartial and found that each juror could remain impartial. *Gresham v. State*, 303 Ga. App. 682, 695 S.E.2d 73 (2010).

Jurors as convicted felons. — Although state notified defendant and trial court soon after trial that two jurors were convicted felons, because there was no evidence establishing the identity of either juror, documenting the convictions,

or showing that either had not had their rights restored, defendant's due process rights were not violated; thus, denial of motion for new trial on this ground was proper. *Jones v. State*, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

Juror investigated accident scene.

— Trial court could not grant a new trial to plaintiff after a jury held for defendant, based on a juror's testimony that the jury foreperson personally investigated the scene of the accident; the testimony impeached the verdict which the jury had returned and the trial court had no power to receive, hear, or consider such evidence. *Newson v. Foster*, 261 Ga. App. 16, 581 S.E.2d 666 (2003).

Effect of waiver of objections.

— Because a father waived any objections concerning the form of the verdict, the trial court did not abuse its discretion when it denied a motion for new trial on claims for tortious interference and misappropriation of trade secrets asserted against the father's son. *Lou Robustelli Mktg. Servs. v. Robustelli*, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

Ineffective assistance of counsel not found.

— Trial court properly denied defendant's motion for a new trial as defense counsel did not give ineffective assistance of counsel by failing to request a Jackson-Denno hearing as there was no basis to object to the introduction of defendant's statement to an investigator as: (1) defendant was not under arrest at the time of the statement, nor would a reasonable person have understood that the person was under arrest; (2) there was no evidence that the officer sent to insure that defendant did not leave the hospital before the investigator arrived had any contact with defendant; (3) that defendant was in pain or taking pain medication did not render defendant's statement involuntary; and (4) defendant failed to show that defendant was prejudiced by the failure to request the hearing. *Alwin v. State*, 267 Ga. App. 236, 599 S.E.2d 216 (2004).

Trial court's denial of defendant's motion for a new trial based on ineffective assistance of counsel was not clearly erroneous as defense counsel was not ineffective in failing to preserve an objection to a slip of the tongue in the jury charge that

did not mislead the jury and as the decision not to request a jury charge on alibi and mere association was a matter of trial strategy. *Brantley v. State*, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Trial court properly denied defendant's motion for a new trial as defense counsel did not provide ineffective assistance of counsel in failing to preserve an objection to the denial of a motion for a mistrial; the motion was based on a deadlocked jury and it was not error to fail to preserve a claim that the jury deliberated without one member present; further, defendant failed to show that the jury deliberated with only 11 members present, so the motion would not have been successful. *Brantley v. State*, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Trial court did not abuse its discretion in denying defendant's motion for a new trial because counsel was not ineffective; counsel was well-prepared, filed pretrial motions, thoroughly cross-examined witnesses, preserved counsel's objections, and successfully excluded hearsay testimony and physical evidence, it was counsel's practice to advise clients of the meaning of trial as a recidivist, of the possible sentences, and of the risks of going to trial, and counsel obtained an acquittal on the greater charge of possession of cocaine with intent to distribute. *Allen v. State*, 272 Ga. App. 23, 611 S.E.2d 697 (2005).

Claim of improper juror contact.

— Trial court properly denied defendant's motion for a new trial because: (1) a juror alleged that an unknown person entered the jury room during deliberations and answered a question regarding an issue about which the jury was confused; (2) the juror recalled that the person was male, but could not recall any other details, including whether or not the person was a representative of the prosecutor's office or the exact nature of the question that was supposedly answered; (3) eight other members of the jury panel and the alternate contradicted the testimony; and (4) one of the jurors not present at the new trial hearing submitted a sworn affidavit stating that the juror did not recall any person entering the jury room during deliberations. *Cook v. State*, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Defense strategy not to allow defendant to testify. — Defendant failed to show that the counsel was deficient and that any alleged deficiency prejudiced the defense, because the counsel's decision not to call defendant as a witness at a trial for malice murder was based on sound trial strategy in that the counsel balanced the damage to defendant's justification defense with the risk that defendant's criminal record would have been introduced if defendant took the stand. *Nixon v. State*, 279 Ga. 164, 611 S.E.2d 9 (2005).

To facilitate becoming naturalized citizen. — It was not an abuse of discretion to deny defendant's motion for a new trial, requested to facilitate defendant's efforts to become a naturalized citizen, because the trial court considered that defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims the defendant's guilty plea was not voluntary were of no avail as defendant failed to move to withdraw the plea or to appeal, and the times for doing so had expired. *Elias v. State*, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

No error in finding foreign speaking defendants understood proceedings. — Trial court did not err in denying the defendants' motions for new trial on the ground that the defendant's could not understand the proceedings. Defendants' claim lacked credibility because at no point during the pre-trial motions hearing or trial did the defendants object or in any way indicate that the defendants could not understand the Spanish translation of the proceedings; during the sentencing hearing, all three defendants responded affirmatively when the trial court specifically asked each of the defendants, through the Spanish interpreter, if the defendants had understood their interpreters and everything the interpreters had explained to the defendants about the trial. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Batson claim unsupported. — Because the record did not support defendant's Batson claim, the trial court did not err in denying defendant's motion for a

new trial. *Quillian v. State*, 279 Ga. 698, 620 S.E.2d 376 (2005).

Because: (1) the record did not demonstrate that the defendant's sanity or competency was or should have been a significant issue at trial; and (2) the defendant failed to support an assertion that competency should have been raised, the defendant failed to prove the prejudice prong of an ineffective assistance of counsel claim due to counsel's failure to request an independent psychiatric examination. Thus, a new trial on this ground was unwarranted. *Jennings v. State*, 282 Ga. 679, 653 S.E.2d 17 (2007).

Services with no value to the client.

— Trial court did not err in denying a former employee benefits plan administrator's motion for new trial on the ground that the jury verdict on the administrator's counterclaims were inconsistent because the verdict could be reasonably interpreted to mean that although the administrator did perform work on a client's behalf, the work had no value to the client; the client presented evidence that the administrator's software platform was of no value to the client, and there was evidence that the client had to expend funds to correct errors made by the administrator. *Hewitt Assocs., LLC v. Rollins, Inc.*, 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Divorce action. — In a divorce action, the trial court did not err in denying a wife's motion for a new trial, as: (1) the court did not err in splitting the federal income tax dependency exemption; and (2) no error resulted from establishing the schedule of physical custody between the parents, the distribution of the parties' marital property, and excepting the custody provisions from supersedeas. *Frazier v. Frazier*, 280 Ga. 687, 631 S.E.2d 666 (2006).

The trial court was not required to grant a new trial based on evidence that the husband and the wife lived together and engaged in sexual relations after the petition for divorce was filed and before the final judgment was entered. *McCoy v. McCoy*, 281 Ga. 604, 642 S.E.2d 18 (2007).

Parent surrendering parental rights not entitled to new trial. — Because a parent validly executed a writ-

ten surrender of parental rights, that parent lacked any right to notice of the proceedings regarding the custody the three children involved and was no longer a "party" to said proceedings; as a result, the parent's extraordinary motion for a new trial seeking to set the custody orders entered after the surrender was accepted was properly denied. In the Interest of A.C., 283 Ga. App. 743, 642 S.E.2d 418 (2007).

No violation of bribery statute warranting new trial. — Trial court did not err in denying the defendant's motion for new trial because there was no violation of the bribery statute, O.C.G.A. § 16-10-2(a)(1), when the record contained no evidence that the state made payments or promised benefits in exchange for testimony at the defendant's trial with the purpose of influencing informants in the performance of such testimony, and it was up to the jury to weigh the evidence of the state's arrangements with the informants in assessing their credibility; the informants were offered leniency, and one of the informants was paid cash, in exchange for their assistance in drug investigations by the police, only a portion of which involved the controlled buys with the defendant, and although the parties could have contemplated that the informants would testify upon the completion of the investigation, there was no evidence that the informants were paid in exchange for their testimony. Moreland v. State, 304 Ga. App. 468, 696 S.E.2d 448 (2010).

Because the trial court's grant of a new trial stemmed from trial error, the defendant could not be retried on an offense of per se DUI, given that the defendant was adjudged not guilty of that charge based upon the insufficiency of the evidence; thus, the trial court erred in denying the plea in bar. Shah v. State, 288 Ga. App. 788, 655 S.E.2d 347 (2007).

No inconsistent verdict in criminal case. — Defendant's argument that the jury rendered an unlawful inconsistent

verdict presented no basis for reversal of defendant's convictions for armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and aggravated assault, O.C.G.A. § 16-5-21, because the appellate record did not make clear the jury's reasoning; the jury was authorized to find the defendant guilty even if the jury found that the defendant used a replica or device having the appearance of a weapon to commit armed robbery. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

Attorney fees awarded were reasonable. — Trial court did not err in denying a law firm's motion for new trial after the court awarded the firm fees under a contingency fee contract because the jury found that the reasonable fee for the work the firm performed for a former client before the firm was discharged was \$20,750; the city called as witnesses the attorney who represented the city in the client's lawsuit against the city, the firm's managing partner, and the firm's remaining partner, and the client called no witnesses and introduced no evidence but argued that the firm's own evidence presented at the trial showed the firm had performed 90 to 180 hours of work on the case, and suggested that a fee of 100 hours times \$200 per hour was a reasonable fee under the contract. Jones, Martin, Parriz & Tessener Law Offices, PLLC v. Westrex Corp., 310 Ga. App. 192, 712 S.E.2d 603 (2011).

5. Improper Subject Matter for Motion for New Trial

Similar transaction witness's recantation. — Trial court did not err in refusing to grant the defendant a new trial when a similar transaction witness recanted prior claims of molestation during the hearing on the motion, as evidence of a witness's recantation merely went to impeach the witness's testimony. Chauncey v. State, 283 Ga. App. 217, 641 S.E.2d 229 (2007).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Ineffective Assistance of Counsel, 5 POF2d 267.

ALR. — Prejudicial effect, in civil case, of communications between court officials or attendants and jurors, 31 ALR5th 572.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damage, 52 ALR 5th 1.

Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal — Individualized determinations, 104 ALR5th 357.

ARTICLE 3

PROCEDURE

5-5-40. Time of motion for new trial generally; amendments; extension of time for filing transcript; time of hearing; priority to cases in which death penalty imposed; appeal not limited to grounds urged; new trial on court’s own motion.

Law reviews. — For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

For note, “Ineffective Assistance of Counsel Blues: Navigating the Muddy

Waters of Georgia Law After 2010 State Supreme Court Decisions,” see 45 Ga. L. Rev. 1199 (2011). For note, “Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony,” see 46 Ga. L. Rev. 213 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
TRANSCRIPT
MOTION

- 1. IN GENERAL
- 2. TIME FOR FILING
- 3. AMENDMENT

APPLICATION

General Consideration

Distinguished from motion for mistrial. — Trial court’s grant of a defendant’s motion for a mistrial over two months after a guilty verdict had been returned was void as a mistrial could not be entered after the verdict was returned; motions for mistrial were not to be confused with motions for a new trial, which were appropriate after the verdict was returned, and Ga. Const. 1983, Art. I, Sec.

I, Para. XVIII, provided for double jeopardy protection except where a new trial had been granted after the conviction or in the case of a mistrial. State v. Sumlin, 281 Ga. 183, 637 S.E.2d 36 (2006).

Cited in Andrews v. Rentz, 266 Ga. 782, 470 S.E.2d 669 (1996); Eisele v. State, 238 Ga. App. 289, 519 S.E.2d 9 (1999); Thomas v. Wiley, 240 Ga. App. 135, 522 S.E.2d 714 (1999); Washington v. State, 276 Ga. 655, 581 S.E.2d 518 (2003); Merritt v. State,

288 Ga. App. 89, 653 S.E.2d 368 (2007); *State v. Jones*, 284 Ga. 302, 667 S.E.2d 76 (2008).

Transcript

Movant's failure to make reasonable effort to secure transcript.

Because defendant failed to obtain a transcript of the trial proceedings within a reasonable time, the trial court properly dismissed defendant's motion for a new trial without holding a hearing pursuant to O.C.G.A. § 5-5-40, as defendant failed to offer a justification or excuse for the delay in securing the transcript; defendant had filed the motion and was initially granted a continuance by the trial court in order to allow defendant to pay the court reporter for the transcript, but defendant failed to secure the transcript one and one-half months later, whereupon the state filed its dismissal motion. *Menefee v. State*, 271 Ga. App. 364, 609 S.E.2d 714 (2005).

Motion

1. In General

Although there is a right to a hearing on a motion for new trial upon a timely request, the court is not required to hold a hearing on a motion for new trial which fails to show any merit and which is made more than 30 days after the entry of judgment. *Wright v. Barnes*, 240 Ga. App. 684, 524 S.E.2d 758 (1999).

A notice of appeal divests the trial court of jurisdiction to hear motions for new trial or to grant a new trial on its own motion after the period in which a motion for new trial may be filed in accordance with this section. *Elrod v. State*, 222 Ga. App. 704, 475 S.E.2d 710 (1996).

2. Time for Filing

Applications for new trial must be filed within 30 days, etc.

Trial court erred in denying the landlord's motion for a new trial as the landlord filed the motion within 30 days of the dismissal of the complaint, O.C.G.A. § 5-5-40(a). *SBP Mgmt., LLC v. Price*, 277 Ga. App. 130, 625 S.E.2d 523 (2006).

In an action which represented the tenth time a litigant had made the same

argument that summary disposition of a prior state court case deprived the litigant of the federal Seventh Amendment right to a jury trial, a motion for a new trial was properly dismissed, given that: (1) the claims therein had been previously addressed and rejected; (2) Ga. Const. 1983, Art. I, Sec. I, Para. XII was a right of choice provision, not a right of access provision; and (3) the motion was both untimely under O.C.G.A. § 5-5-40(a), and filed in the wrong county court in violation of O.C.G.A. § 9-11-60(b). *Crane v. Poteat*, 282 Ga. App. 182, 638 S.E.2d 335 (2006), cert. denied, 2007 Ga. LEXIS 54 (Ga. 2007); cert. dismissed, 551 U.S. 1101, 127 S. Ct. 2912, 168 L. Ed. 2d 241 (2007).

Filing after time prescribed does not toll time for filing notice of appeal.

Motion for new trial that was not filed within 30 days as required by this section was void, had no effect and did not toll the time for filing a notice of appeal under § 5-6-38. *Peters v. State*, 237 Ga. App. 625, 516 S.E.2d 331 (1999).

Motion for new trial filed before judgment is entered, is premature and invalid.

Because the defendant's motion for new trial was filed prior to the entry of the judgment on the verdict, the motion was premature and invalid, and although the defendant subsequently filed an amended motion for new trial, no amendment could be filed to such void motion; if the court of appeals considered the defendant's amendment to the motion as a motion for new trial, that motion was filed long after the time allowed for filing the motion. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Motion for new trial alleging ineffective assistance of trial counsel was raised at earliest practicable moment and not procedurally barred. — Because defendant's trial counsel filed a motion for new trial after the jury verdict was rendered, which motion was denied, and thereafter, appellate counsel was appointed for defendant and a notice of appeal was filed which raised the claim of ineffective assistance of trial counsel, that issue was not procedurally barred, as appellate counsel raised it at the earliest

practicable moment; a second new trial motion was not required once appellate counsel was appointed, and the ruling had been made on the first motion for new trial prior to appellate counsel having been appointed, pursuant to O.C.G.A. § 5-5-40(b). *Haggard v. State*, 273 Ga. App. 295, 614 S.E.2d 903 (2005).

Defendant procedurally barred from raising ineffective assistance of counsel claim. — In a criminal case, because appellate counsel was appointed prior to the filing of the notice of appeal, the defendant was procedurally barred from raising for the first time on appeal the issue of ineffectiveness of counsel as neither trial counsel nor appellate counsel moved for a new trial asserting ineffective assistance of trial counsel, which motion was available when appellate counsel filed the notice of appeal. *Cooper v. State*, 287 Ga. App. 901, 652 S.E.2d 909 (2007).

Defendant not barred from raising ineffective assistance of counsel claim. — Postconviction court erred in denying the defendant's motion for a new trial without affording the defendant the opportunity to present evidence to support the defendant's ineffective assistance claim because the defendant had the right to representation by conflict-free counsel through which to raise claims of ineffective assistance of trial counsel in a motion for new trial and because the defendant could amend a motion for a new trial at any time before ruling thereon pursuant to O.C.G.A. § 5-5-40(b). Because the defendant raised the defendant's ineffective assistance claim through conflict-free counsel when counsel filed the amendment to the defendant's motion for a new trial, the defendant was entitled to a hearing on the merits on that claim. *Lee v. State*, 308 Ga. App. 711, 708 S.E.2d 633 (2011).

Motion must be disposed of to extend time for filing notice of appeal. — Because the plaintiff filed a second application for discretionary appeal on June 28, 2010, after withdrawing the plaintiff's motion for new trial, the motion was untimely as the motion was filed 61 days after the entry of the judgment on April 28; pursuant to O.C.G.A. § 5-6-38, the trial court had to dispose of the motion

for new trial to extend the time for filing a notice of appeal. *Cooper v. Spotts*, 309 Ga. App. 361, 710 S.E.2d 159 (2011).

3. Amendment

Amendment not allowed. — Motion for new trial may be amended any time before the ruling thereon; since appellate counsel had over four months to raise an ineffective assistance of trial counsel claim in an amended motion for new trial or in the hearing, but failed to do so, an appellate court declined to consider that claim raised for the first time on appeal. *Swint v. State*, 279 Ga. App. 777, 632 S.E.2d 712 (2006).

Application

Motion improper after guilty plea. — In addition to being improper following the entry of a guilty plea to child molestation, a defendant's motion for new trial was untimely, having been filed more than a year after entry of judgment, O.C.G.A. § 5-5-40(a), and was therefore void and of no effect. *Roseborough v. State*, 311 Ga. App. 456, 716 S.E.2d 530 (2011).

Claim of innocence in habeas petition was not a constitutional claim. — Petitioner, a death row inmate argued in a federal habeas petition as a separate claim for relief that the petitioner was actually innocent, but that claim failed because actual innocence was not itself a constitutional claim, and was instead a gateway through which a habeas petitioner had to pass to have the petitioner's otherwise barred constitutional claim considered on the merits; further, the claim was not properly before the federal court, as the inmate could pursue a claim of actual innocence in state court by filing an extraordinary motion for new trial under O.C.G.A. §§ 5-5-23, 5-5-40, and 5-5-41. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), *aff'd in part and rev'd in part*, 570 F.3d 1283 (11th Cir. Ga. 2009).

Failure to raise issues in criminal matter waived issues. — Defendant was not entitled to a new trial under O.C.G.A. § 5-5-40 on three kidnapping convictions on the basis that the defendant received ineffective assistance of counsel because while ineffective assistance was found on the basis that trial

counsel failed to cross-examine the defendant's former girlfriend adequately, failed to argue cogently on behalf of a directed verdict motion on the kidnapping charges, and presented only a perfunctory closing argument, the defendant waived those issues as the defendant did not claim that trial counsel was ineffective on those particular grounds in the defendant's motion for new trial. *State v. Jones*, 284 Ga. 302, 667 S.E.2d 76 (2008).

As the defendant failed to assert in a new trial motion under O.C.G.A. § 5-5-40(a) that trial counsel was ineffective for various reasons, the defendant was thereafter procedurally barred from raising that issue on appeal. *Hornsby v. State*, 296 Ga. App. 483, 675 S.E.2d 502 (2009).

Notice of appeal divested trial court of jurisdiction. — Trial court's denial of defendant's new trial motion was proper because defendant did not raise the issue of the trial counsel's ineffectiveness at the first available opportunity, as defendant's filing of a notice of appeal divested the trial court of jurisdiction over such a motion, and moreover, the motion was untimely filed pursuant to O.C.G.A. § 5-5-40(a); there was no evidence that overcame the presumption of effective assistance of counsel pursuant to U.S. Const. amend. VI, as defendant could not substantiate the allegations solely from the record and defendant declined the opportunity to have the counsel testify. *Carter v. State*, 275 Ga. App. 846, 622 S.E.2d 60 (2005).

Filing of notice of appeal did not divest trial court of jurisdiction. — Because the defendant's pro se motion for a new trial was filed within the time allotted for an out-of-time appeal, the fact that the defendant filed a pro se notice of appeal did not divest the trial court of jurisdiction to consider the motion for a new trial; thus, the denial of the motion, which contained a claim of ineffective assistance of counsel claim, was not a nullity for purposes of consideration by the court of appeals of the denial of the ineffective assistance of counsel claim. *Hood v. State*, 282 Ga. 462, 651 S.E.2d 88 (2007).

Denial of parent's request for transcript of termination hearing. — Par-

ent alleged the trial court erred in denying the parent a copy of the transcript of the hearing on the petition for termination of parental rights for use at a new trial hearing. However, under O.C.G.A. § 5-5-40(c), the trial court had discretion to hear and determine the new trial motion before the transcript of evidence and proceedings was prepared and filed. In *re D. R.*, 298 Ga. App. 774, 681 S.E.2d 218 (2009), overruled on other grounds, In *re A.C.*, 285 Ga. 829, 686 S.E.2d 635 (2009).

Motion for new trial should have raised issue of ineffective assistance of counsel. — Defendant's convictions for rape, incest, child molestation, and cruelty to children were proper because defendant's ineffective assistance of counsel claim was procedurally barred. In order for the defendant's claim of ineffectiveness to have been heard by the appellate court, the defendant's new counsel should have amended the motion for new trial to include a claim for ineffective assistance, pursuant to O.C.G.A. § 5-5-40; having failed to do so, the defendant failed to preserve the issue for review. *Harrison v. State*, 299 Ga. App. 744, 683 S.E.2d 681 (2009).

Motion filed while defendant a fugitive. — Because the defendant was a fugitive when defense counsel filed the defendant's motion for a new trial, the defendant waived the defendant's right to seek such relief, even though the defendant was no longer a fugitive at the time the motion was dismissed; accordingly, the trial court properly denied the defendant's motion to reinstate the motion for a new trial. Moreover, so long as the defendant remained a fugitive, the defendant's attorney was not entitled to assert the defendant's rights to postconviction relief on the defendant's behalf. *Harper v. State*, 300 Ga. App. 25, 684 S.E.2d 96 (2009), cert. denied, No. S10C0152, 2010 Ga. LEXIS 7 (Ga. 2010).

Creditor's claim was nondischargeable. — Creditor lost the creditor's bid for a grant of summary judgment on the creditor's claim that the judgment was nondischargeable per 11 U.S.C. § 523 based on the claimed collateral estoppel effect of a Georgia state court default judgment awarding damages for the

creditor's father's death because the creditor did not establish that judgment was final and nonappealable in that the creditor did not show that the judgment was not subject to review under the "extraor-

dinary cases" exception to the 30-day period for filing a motion for a new trial established in O.C.G.A. § 5-5-40(a). *Terhune v. Houser* (In re Houser), 458 B.R. 771 (Bankr. N.D. Ga. 2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, New Trial, § 14.

5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing.

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c)(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6)(A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and forfeiture fund as provided in Article 3 of Chapter 5 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section. (Orig. Code 1863, § 3645; Code 1868, § 3670; Ga. L. 1873, p. 47, § 1; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303; Ga. L. 2003, p. 247, § 1; Ga. L. 2011, p. 264, § 1-2/SB 80; Ga. L. 2012, p. 775, § 5/HB 942.)

The 2003 amendment, effective May 27, 2003, added subsection (c).

The 2011 amendment, effective May 11, 2011, deleted "serious violent" and "as defined in Code Section 17-10-6.1" preceding and following "felony" in paragraph (c)(1).

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modern-

ize, and correct the Code, revised punctuation in paragraph (c)(1).

Editor's notes. — Ga. L. 2003, p. 247, § 5, not codified by the General Assembly, provides that: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval. Notwithstanding the provisions of subsection (b) of Code Section 5-5-41,

any person convicted of a serious violent felony as defined in Code Section 17-10-6.1, which conviction was imposed prior to the effective date of this Act, who has, prior to the effective date of this Act, filed an extraordinary motion for new trial, may file an extraordinary motion for new trial pursuant to Section 1 of this Act if the issue of DNA testing was not raised or denied in the prior extraordinary motion for new trial. In any extraordinary motion for new trial allowed pursuant to Section 1 of this Act, the court shall not have jurisdiction to reconsider any other issue raised in the first extraordinary motion for new trial. Notwithstanding the provisions of subparagraph (c)(4)(B) of Code Section 5-5-41, any person convicted of a serious violent felony as defined in Code Section 17-10-6.1, which conviction was imposed prior to the effective date of

this Act, who has, prior to the effective date of this Act, previously litigated in a court of this state or the United States the issue of postconviction DNA testing and who was denied DNA testing may file an extraordinary motion for new trial pursuant to Section 1 of this Act."

Ga. L. 2011, p. 264, § 1-1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Johnia Berry Act.'"

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 119 (2003). For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TRIAL COURT'S DISCRETION

EXTRAORDINARY MOTIONS BASED ON NEWLY DISCOVERED EVIDENCE APPLICATION

1. IN GENERAL
2. WHEN EXTRAORDINARY MOTION PROPER
3. WHEN EXTRAORDINARY MOTION UNAVAILABLE

General Consideration

Failure to state facts sufficient for grant of motion.

Although defendant was not entitled to a hearing on a motion for DNA testing unless the motion complied with the requirements set forth in O.C.G.A. § 5-5-41(c)(3), (4), the trial court erred in simply denying the motion without explanation, and in failing to determine whether defendant was entitled to a hearing on the motion, or to otherwise set forth any rationale or basis for denying the motion. *Johnson v. State*, 272 Ga. App. 294, 612 S.E.2d 29 (2005).

Trial court properly denied inmate's pro se motion for DNA testing, which was filed 20 years after that inmate was convicted of aggravated sodomy and rape, as the identity of the perpetrator of the rape was not a significant issue in the case, and inmate failed to satisfy all elements under

O.C.G.A. § 5-5-41(c) to warrant that relief. *Williams v. State*, 289 Ga. App. 856, 658 S.E.2d 446 (2008).

Appeal from decision rendered on merits following granting of out-of-time motion. — Even though defendant did not timely file a motion for a new trial because defendant did not file such a motion within 30 days of the entry of conviction and the imposition of sentence, the state supreme court had jurisdiction to hear defendant's appeal, as the trial court granted permission to defendant to file an out-of-time motion for a new trial and denied that motion on its merits following a hearing, and, thus, defendant was entitled to file a direct appeal to the appropriate reviewing court. *Washington v. State*, 276 Ga. 655, 581 S.E.2d 518 (2003).

Appellate jurisdiction. — When the plaintiff filed an extraordinary motion for

new trial, which the trial court denied, appellate jurisdiction existed; although no ruling on the motion was contained in the record on appeal or requested in the notice of appeal, the trial court implicitly granted permission to file the motion by expressly recognizing the plaintiff's pleading as both a request to file an out-of-time motion for new trial and as a motion for new trial, by holding an evidentiary hearing on the merits of the motion for new trial, and by denying the motion for new trial on its merits. *Fowler Props. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

State has right to direct appeal. — State could directly appeal from an order granting defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing by an uncertified laboratory because defendant filed only a post-conviction motion and did not file an extraordinary motion for new trial; the trial court had ruled on the merits of the only pending motion, there was no issue remaining, and a direct appeal would not create absurd results. *State v. Clark*, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Trial Court's Discretion

Trial judge acts as trier of fact in passing upon grounds of motion.

When the trial judge passes upon the grounds of an extraordinary motion for new trial, he occupies the position of a trier of fact, and his discretion in refusing the motion will not be disturbed unless manifestly abused. *Satterwhite v. State*, 235 Ga. App. 687, 509 S.E.2d 97 (1998).

No special need for independent test shown. — trial court did not err in denying a defendant's post-conviction motion for funds to hire an expert of the defendant's choosing to conduct an independent DNA test since O.C.G.A. § 5-5-41 provided a method for the defendant to obtain additional testing; therefore, there was no special need for the trial court to fund an independent test. *Palmer v. State*, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. 2007).

Trial court lacked discretion to ignore statutory mandate. — Trial court erred in ignoring the mandate of O.C.G.A.

§ 5-5-41(c)(9) by ordering the state to provide evidence to an uncertified laboratory for testing. *State v. Clark*, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Extraordinary Motions Based on Newly Discovered Evidence

Denial of motion did not amount to abuse of discretion. — The trial court did not abuse the court's discretion in denying the defendant's extraordinary motion for new trial without a hearing as: (1) the alleged newly-discovered evidence was not so material that it would likely result in a different verdict; (2) the affidavits presented lacked the type of materiality required to support a new trial as they did not show the witnesses's trial testimony to have been the purest fabrication; (3) the defendant failed to act diligently in presenting the affidavits alleged to have supported the motion; (4) the trial court favored the original testimony, and as such, could not disregard the jury's verdict; and (5) the defendant failed to present the facts necessary to warrant a hearing on the motion. *Davis v. State*, 283 Ga. 438, 660 S.E.2d 354 (2008), cert.denied, mot. granted, 129 S. Ct. 397, 172 L.Ed.2d 323 (2008).

Claim of innocence in habeas petition was not a constitutional claim. — Petitioner, a death row inmate, argued in a federal habeas petition as a separate claim for relief that the petitioner was actually innocent, but that claim failed because actual innocence was not itself a constitutional claim, and was instead a gateway through which a habeas petitioner had to pass to have the petitioner's otherwise barred constitutional claim considered on the merits; further, the claim was not properly before the federal court, as the inmate could pursue a claim of actual innocence in state court by filing an extraordinary motion for new trial under O.C.G.A. §§ 5-5-23, 5-5-40, and 5-5-41. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Application

1. In General

Statute provides for immediate quid pro quo. — Trial court erred by not

requiring defendant to submit a sample of defendant's deoxyribonucleic acid (DNA) to the Georgia Bureau of Investigation for testing and for placement in the DNA data bank at the same time that it granted defendant testing of the slides; O.C.G.A. § 5-5-41(c)(9) provides for an immediate quid pro quo and if a defendant obtains an order for post-conviction DNA testing, a reference sample has to be provided simultaneously to the DNA data bank. *State v. Clark*, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Brady violation not found. — Trial court did not err in denying defendant's motion for a new trial due to an alleged Brady violation where there was no evidence of a lack of diligence by the state in inquiring about the status of the latent prints on the victim's car 18 years after the murder, or of any deliberate falsehood regarding their existence. *Wilson v. State*, 277 Ga. 114, 587 S.E.2d 9 (2003).

Findings in first order need not be restated. — Trial court complied with O.C.G.A. § 5-5-41(c)(8) because the court determined in its first order that defendant was indigent and that payment for any deoxyribonucleic acid (DNA) testing would be made from the fine and forfeiture fund. *State v. Clark*, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

2. When Extraordinary Motion Proper

Juror misconduct. — A new trial pursuant to extraordinary motion was unavailable on the ground of juror misconduct, where the motion was supported by the testimony of only one juror some four years after the defendant's conviction, and the alleged misconduct of two jurors was not so prejudicial that the verdict lacked due process. *Satterwhite v. State*, 235 Ga. App. 687, 509 S.E.2d 97 (1998).

After defendant's conviction has been affirmed on appeal, extraordinary motion for new trial is one of three available remedies. — Petitioner's motion to vacate his conviction was not an appropriate remedy in a criminal case after petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of *Chester v. State*, 284 Ga. 162 (2008), which had

allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after it had been affirmed on direct appeal, petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. *Harper v. State*, 286 Ga. 216, 686 S.E.2d 786 (2009).

3. When Extraordinary Motion Unavailable

No special circumstances were present justifying an extraordinary motion for a new trial based on proffered testimony of defendant's codefendant who had invoked the codefendant's Fifth Amendment right not to testify at the prior trial and who had pled guilty and been sentenced in the interim because the substance of the testimony was not in fact new evidence since it was always known by the defendant, and the witness lacked credibility since the witness had nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant. *Hester v. State*, 219 Ga. App. 256, 465 S.E.2d 288 (1995).

Prior motion for new trial. — Defendant's pleading, which sought an out-of-time appeal under circumstances where such an appeal was not permitted, could not be considered an extraordinary motion for new trial since defendant had already filed such a motion in 1992 and was statutorily limited to filing one such motion under O.C.G.A. § 5-5-41(b). *Richards v. State*, 275 Ga. 190, 563 S.E.2d 856 (2002).

Defendant failed to show test results would have resulted in acquittal. — Trial court did not err when it concluded that defendant's request for DNA testing failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3) because defendant did not show that, had DNA testing been performed during defendant's trial on a charge of murder, there was a reasonable probability the results would have led to defendant's acquittal. *Crawford v. State*, 278 Ga. 95, 597 S.E.2d 403, cert. denied, stay denied, 542 U.S. 954, 125 S. Ct. 5, 159 L. Ed. 2d 837 (2004).

Post-conviction motion for DNA testing denied. — Trial court did not abuse the court’s discretion in denying a defendant’s post-conviction motion for deoxyribonucleic acid (DNA) testing because the defendant was barred from requesting DNA testing under O.C.G.A.

§ 5-5-41(c)(3) since the defendant’s conviction for the crime of incest in violation of O.C.G.A. § 16-6-22(a)(3) was not defined as a serious violent felony under O.C.G.A. § 17-10-6.1(a). *Hunter v. State*, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Admissibility and Reliability of Hair Sample Test-

ing to Prove Illegal Drug Use, 47 POF3d 203.

5-5-42. Form for motion for new trial.

(a) The form for motion for new trial in civil cases prescribed in subsection (b) of this Code section shall be sufficient, but any other form substantially complying therewith shall also be sufficient.

(b) Form for motion for new trial in civil cases:

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil Action
	)	File no. _____
_____)	
Defendant)	
)	

MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict returned herein on _____ (date) _____, and the judgment entered thereon on _____ (date) _____, and to grant a new trial on the following grounds:

- (1) The verdict is contrary to law.
- (2) The verdict is contrary to the evidence.
- (3) The verdict is strongly against the weight of the evidence.
- (4) The court erred in permitting witness Smith to testify as follows: _____.
- (5) The court erred in failing to charge the jury on unavoidable accident as requested in writing by defendant.
- (6) The court erred in charging the jury as follows: _____.

Dated: _____.

Attorney for defendant

Address

(Here set forth rule nisi and certificate of service.)

(c) The form for motion for new trial in criminal cases in subsection (d) of this Code section is declared to be sufficient but any other form substantially complying therewith shall also be sufficient.

(d) Form for motion for new trial in criminal cases:

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
The State)	
)	
v.	)	Indictment
	)	Accusation
_____)	
Defendant	)	File no. _____

MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict returned herein on _____ (date) _____, _____, and the sentence entered thereon on _____ (date) _____, _____, and to grant a new trial on the following grounds:

- (1) The defendant should be acquitted and discharged due to the state's failure to prove guilt beyond a reasonable doubt.
- (2) Although the state proved the defendant's guilt beyond a reasonable doubt, the evidence was sufficiently close to warrant the trial judge to exercise his discretion to grant the defendant a retrial.
- (3) The court committed an error of law warranting a new trial.

Dated: _____.

Attorney for defendant

Address

(Here set forth rule nisi and certificate of service.)

(Ga. L. 1965, p. 18, § 20; Ga. L. 1983, p. 702, § 1; Ga. L. 1984, p. 22, § 5; Ga. L. 1999, p. 81, § 5.)

The 1999 amendment, effective April 5, 1999, part of an Act to revise, modernize, and correct the Code, deleted “19” from the date lines in the forms in subsections (b) and (d).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, New Trial, § 80.

5-5-43. Allowance of filing of motion by judge other than trial judge.

RESEARCH REFERENCES

ALR. — Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 ALR5th 399.

5-5-44. Service of rule nisi; filing and recordation of motion.

JUDICIAL DECISIONS

ANALYSIS

METHOD OF SERVICE
DISMISSAL OF MOTION

Method of Service

Failure to perfect service of a motion for new trial in accordance with O.C.G.A. § 5-5-44 renders the motion void. *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

Dismissal of Motion

Failure to attach rule nisi to motion

for new trial does not demand dismissal, etc.

In accord with *Stoner v. McDougall*. See *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

5-5-46. Operation of rule nisi as supersedeas in criminal cases; superseding of sentence.

JUDICIAL DECISIONS

Delay in paying costs. — Delay of slightly more than 30 days in paying the bill of costs because of appellant’s medical condition was properly found to be neither unreasonable nor inexcusable. *Poythress v. Savannah Airport Comm’n*, 229 Ga. App. 303, 494 S.E.2d 76 (1997).

5-5-47. Right to give supersedeas bond for bailable offense upon filing of new trial motion; assessment and approval of bond.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Excessive Bail, 18 POF2d 149.

5-5-48. Time of new trial generally.

JUDICIAL DECISIONS

Where case reversed, evidence sufficiency not addressed. — Enumerations of error relating to sufficiency of evidence will not be addressed on appeal where a case is reversed, since new or additional evidence may be presented at a new trial. *Vitello v. Stott*, 222 Ga. App. 134, 473 S.E.2d 504 (1996).

Grant of directed verdict authorized. — At a second trial following the grant of plaintiff's motion for a new trial, the trial court was authorized to dismiss the defendant's counterclaims and grant a directed verdict for the plaintiff. *Tyson v. Cheek Mechanical & Elec. Serv., Inc.*, 218 Ga. App. 134, 460 S.E.2d 536 (1995).

Delay in paying costs. — Delay of slightly more than 30 days in paying the

bill of costs because of appellant's medical condition was properly found to be neither unreasonable nor inexcusable. *Poythress v. Savannah Airport Comm'n*, 229 Ga. App. 303, 494 S.E.2d 76 (1997).

Failure to conduct new trial. — On remand, because the only relief sought by a distributor in a contract action with a buyer was a new trial, the trial court erred in entering judgment in favor of the distributor without conducting a new trial; moreover, the buyer was not foreclosed from presenting additional or different evidence in support of its claim for lost profits in said trial. *Strickland & Smith, Inc. v. Williamson*, 281 Ga. App. 784, 637 S.E.2d 170 (2006).

5-5-49. Trial of cases returned for new trial by appellate courts.

JUDICIAL DECISIONS

Failure to move to dismiss counterclaim. — Because a landlord chose not to move to dismiss a tenant's counterclaim at the first bench trial on the specific ground that the tenant failed to prove the amount of damages for its attorney-fees counterclaim, the tenant was not alerted to the need to reopen its case to cure the prob-

lem, and the landlord's decision meant that following reversal and remand, the trial court was required to allow the tenant to prove those fees at a second trial. *Sugarloaf Mills Ltd. P'ship v. Record Town, Inc.*, 306 Ga. App. 263, 701 S.E.2d 881 (2010).

5-5-50. Standard for review by appellate court of first grant of new trial.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICABILITY
CONSTRUCTION

General Consideration

Trial court was not authorized to grant a new trial on the issue of damages in a case where comparative negligence was involved. *Head v. CSX Transp., Inc.*, 227 Ga. App. 818, 490 S.E.2d 497 (1997).

Special verdict form was not objectionable. — Trial court erred in granting a new trial, pursuant to the standard of review under O.C.G.A. §§ 5-5-50 and 5-5-51, to the second insurer in the first insurer's declaratory judgment action arising from a coverage dispute, after the jury rendered a verdict pursuant to a special verdict form in favor of the first insurer, since the form was not defective for including the words "coverage is excluded because" prior to the four potential fact-findings in favor of the first insurer; the wording of the form may have been inartful and had mixed questions of law with the factual assertions, but such did not constitute an abuse of the trial court's discretion, as no mandate forbade the use of the language, and the trial court acted within its discretion and authority pursuant to O.C.G.A. § 9-11-49(a). *Gov't Empls. Ins. Co. v. Progressive Cas. Ins. Co.*, 275 Ga. App. 872, 622 S.E.2d 92 (2005).

Cited in *Head v. CSX Transp., Inc.*, 271 Ga. 670, 524 S.E.2d 215 (1999); *Action Sound, Inc. v. DOT*, 265 Ga. App. 616, 594 S.E.2d 773 (2004).

Applicability

Section inapplicable to first grant of new trial based on denial of pretrial motion to sever. — Motion for new trial was granted on a special ground, namely that the trial court erred by denying defendant's pretrial motion to sever two different counts of armed robbery committed against two different victims at different times; therefore, the standard

set forth in O.C.G.A. § 5-5-50 is not applicable and the Court of Appeals properly considered the propriety of the trial court's ruling on the question of law regarding severance of the defendant's offenses. To the extent that *State v. McMillon*, 283 Ga. App. 671, 642 S.E.2d 343 (Ga. Ct. App. 2007), and *State v. Lamb*, 287 Ga. App. 389, 651 S.E.2d 504 (Ga. Ct. App. 2007), conflicted with the holding that the standard set forth in § 5-5-50 was not applicable in a case involving the first grant of a new trial on special grounds involving a question of law, those cases are overruled. *O'Neal v. State*, 285 Ga. 361, 677 S.E.2d 90 (2009).

New trial when verdict could go either way. — Trial court's grant of a new trial was affirmed as the opposing party in that party's appellate brief failed to show that the law and the facts required the verdict rendered at trial and admitted that the jury could have ruled in favor of either party. *Dryman v. Watts*, 268 Ga. App. 710, 603 S.E.2d 51 (2004).

Because there was expert evidence that supported a finding of negligence and causation against physicians and their employers in a medical malpractice action by a patient, a verdict in the physicians' favor was not absolutely demanded, and the trial court did not abuse its discretion in granting the patient's motion for new trial, pursuant to O.C.G.A. §§ 5-5-20 and 5-5-50, after the jury rendered a verdict in favor of the physicians. *Bhansali v. Moncada*, 275 Ga. App. 221, 620 S.E.2d 404 (2005).

Construction

First grant of new trial not reversed unless law and facts require verdict, etc.

In accord with *Holton v. Jones*. See *Thomas v. Wiley*, 240 Ga. App. 135, 522 S.E.2d 714 (1999).

5-5-51. Written basis for exercise of judicial discretion for new trial.

JUDICIAL DECISIONS

Trial court's written order granting a new trial on the general grounds was in compliance with the requirements of this section. *Jackson Nat'l Life Ins. Co. v. Snead*, 231 Ga. App. 406, 499 S.E.2d 173 (1998).

Special verdict form was not objectionable. — Trial court erred in granting a new trial, pursuant to the standard of review under O.C.G.A. §§ 5-5-50 and 5-5-51, to the second insurer in the first insurer's declaratory judgment action arising from a coverage dispute, after the jury rendered a verdict pursuant to a special verdict form in favor of the first insurer, since the form was not defective

for including the words "coverage is excluded because" prior to the four potential fact-findings in favor of the first insurer; the wording of the form may have been inartful and had mixed questions of law with the factual assertions, but such did not constitute an abuse of the trial court's discretion, as no mandate forbade the use of the language, and the trial court acted within its discretion and authority pursuant to O.C.G.A. § 9-11-49(a). *Gov't Emples. Ins. Co. v. Progressive Cas. Ins. Co.*, 275 Ga. App. 872, 622 S.E.2d 92 (2005).

Cited in *O'Neal v. State*, 285 Ga. 361, 677 S.E.2d 90 (2009).

CHAPTER 6

CERTIORARI AND APPEALS TO APPELLATE COURTS
GENERALLY

Article 1		Sec.	
General Provisions			
Sec.			
5-6-4.	Bill of costs; payment of costs; filing of affidavit of indigence; payment of costs or filing of affidavit as prerequisite to receipt of application for appeal or brief by clerk.	5-6-35.	nonmonetary judgments in child custody cases. Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal; appeals involving nonmonetary judgments in child custody cases.
Article 2			
Appellate Practice			
5-6-34.	(For effective date, see note) Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought; appeals involving	5-6-43.	Preparation and transmittal of record on appeal by court clerk; retention of copy by clerk; furnishing at no cost to Attorney General in capital cases; notification where defendant confined to jail.
		5-6-45.	Operation of notice of appeal as supersedeas in criminal cases; bond; review.
		5-6-46.	Operation of notice of appeal as

Sec.	Supersedeas in civil cases; requirement of supersedeas bond or other form of security; fixing of amount; procedure upon no or insufficient filing; effect of bond as to liability of surety; punitive damages.	Sec.	Appeal; amendments; correcting or supplementing record or transcript; effect of dismissal of appeal upon cross appeal; effect of deficiencies upon consideration of appeal.
5-6-48.	Grounds for dismissal of ap-	5-6-51.	Forms.

Law reviews. — For survey of 1995 and procedure, see 47 Mercer L. Rev. 907 Eleventh Circuit cases on trial practice (1996).

ARTICLE 1
GENERAL PROVISIONS

5-6-1. Appearance before court of interested third parties.

JUDICIAL DECISIONS

Cited in In re Stroh, 272 Ga. 894, 534 S.E.2d 790 (2000).

5-6-4. Bill of costs; payment of costs; filing of affidavit of indigence; payment of costs or filing of affidavit as prerequisite to receipt of application for appeal or brief by clerk.

The bill of costs for every application to the Supreme Court for a writ of certiorari or for applications for appeals filed in the Supreme Court or the Court of Appeals or appeals to the Supreme Court or the Court of Appeals shall be \$80.00 in criminal cases and in habeas corpus cases for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court and \$300.00 in all other civil cases. The costs shall be paid by counsel for the applicant or appellant at the time of the filing of the application or, in the case of direct appeals, at the time of the filing of the original brief of the appellant. In those cases in which the writ of certiorari or an application for appeal is granted, there shall be no additional costs. Costs shall not be required in those instances when at the time the same are due counsel for the applicant or appellant shall file a statement that an affidavit of indigence has been duly filed or file an affidavit that he or she was appointed to represent the defendant by the trial court because of the defendant's indigency. The clerk is prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been paid or a sufficient affidavit of indigence is filed or contained in the record. (Ga. L. 1921, p. 239, § 1; Code 1933, § 6-1702; Ga. L. 1965, p.

650, § 1; Ga. L. 1982, p. 1186, § 1; Ga. L. 1991, p. 411, § 1; Ga. L. 2009, p. 644, § 1/HB 283.)

The 2009 amendment, effective July 1, 2009, added “in criminal cases and in habeas corpus cases for persons whose liberty is being restrained by virtue of a

sentence imposed against them by a state court and \$300.00 in all other civil cases” at the end of the first sentence.

JUDICIAL DECISIONS

If harm from lost transcript, new trial. — The loss of transcripts and tapes from certain pretrial proceedings did not entitle the defendants to a new trial, as they did not prove harm resulting from

the loss. *Robinson v. State*, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Cited in *Miller v. Grand Union Co.*, 250 Ga. App. 751, 552 S.E.2d 491 (2001).

RESEARCH REFERENCES

ALR. — What constitutes “fees” or “costs” within meaning of Federal Statutory Provision (28 USCS § 1915 and similar predecessor statutes) permitting

party to proceed in forma pauperis without prepayment of fees and costs or security therefor, 142 ALR Fed 627.

5-6-5. Entry of judgment for costs on reversal.

JUDICIAL DECISIONS

Jury trial not authorized under this section. — Because O.C.G.A. § 5-6-5 was enacted in 1845, the statutory procedure for the recovery of appellate costs was unknown in 1798, the year the Georgia Constitution was enacted, and there was no right to jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). *Mize v. First Citizens Bank & Trust Co.*, 302 Ga. App. 757, 691 S.E.2d 648 (2010).

Costs on appeal are controlled by this section rather than § 9-11-54. *Barnett v. Thomas*, 129 Ga. App. 583, 200 S.E.2d 327 (1973), disapproved sub nom. *Stone Mt. Mem. Ass’n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

Cost of transcript not recoverable.

In accord with bound volume. See *Gwinnett Property v. G & H Montage*, 215 Ga. App. 889, 453 S.E.2d 52 (1994).

Motion to recover costs not timely. — Trial court did not abuse its discretion in denying an insured’s motion for appellate costs under O.C.G.A. § 5-6-5 as the insured filed the motion nearly eight months after the remittur from the appel-

late court’s decision. *Ponse v. Atlanta Cas. Co.*, 270 Ga. App. 122, 605 S.E.2d 826 (2004).

Because the movants failed to timely file their motion for appellate costs within a reasonable time after the return of the remittitur, specifically, three months and twenty days later, and they sought appellate expenses in excess of those allowed under O.C.G.A. § 5-6-5, their motion was properly denied as untimely. *Morton v. Horace Mann Ins. Co.*, 282 Ga. App. 734, 639 S.E.2d 352 (2006), cert. denied, 2007 Ga. LEXIS 201 (Ga. 2007).

Obtaining substantial modification of judgment may entitle one to recovery of costs.

Trial court erred in denying appellant’s motion for appellate costs following the Court of Appeals’ partial reversal of the trial court’s grant of summary judgment, which was a substantial modification entitling appellant to fees. *Burritt v. Media Mktg. Servs.*, 242 Ga. App. 92, 527 S.E.2d 890 (2000).

Judgment of reversal is not essential for the recovery of costs by the plaintiff in

error; if the plaintiff in error obtains a substantial modification of the judgment complained of, then the plaintiff in error is entitled to the costs of bringing the case to the appellate court. *Barrow County Airport Auth. v. Romanair, Inc.*, 260 Ga. App. 887, 581 S.E.2d 402 (2003).

Where a trial court found that a rent adjustment by a lessor was invalid under the terms of the lease, but the appellate court reversed the trial court's interpretation of the lease on that issue, affirmed most of the trial court's other rulings, and remanded the case for the trial court to apply the correct interpretation of the lease, the trial court, upon remand, did

not err in casting all costs against the lessor, as the lessor's achievement of the partial reversal in the first appeal did not equate to obtaining a substantial modification of the judgment, especially since, upon remand, the trial court still found that the rent adjustment was invalid after applying the appellate court's interpretation of the lease. *Barrow County Airport Auth. v. Romanair, Inc.*, 260 Ga. App. 887, 581 S.E.2d 402 (2003).

Cited in *Miller v. Grand Union Co.*, 250 Ga. App. 751, 552 S.E.2d 491 (2001); *Effingham County Bd. of Tax Assessors v. Samwilka, Inc.*, 278 Ga. App. 521, 629 S.E.2d 501 (2006).

5-6-6. Damages for frivolous appeal.

Law reviews. — For annual survey of construction law, see 56 *Mercer L. Rev.* 109 (2004). For annual survey of law on

appellate practice and procedure, see 62 *Mercer L. Rev.* 25 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

1. IN GENERAL
2. WHEN APPEAL IS FRIVOLOUS
3. WHEN APPEAL NOT FRIVOLOUS

General Consideration

Arbitration of attorney fees incurred on appeal. — Contractor, who successfully defended an arbitration award on appeal, was not limited to then seeking attorney fees for a frivolous appeal before the appellate court pursuant to O.C.G.A. § 5-6-6, but could submit the appellate fee dispute to arbitration as the issue of attorney fees was governed by the arbitration provision in a contract between the contractor and a county. *Yates Paving & Grading Co. v. Bryan County*, 265 Ga. App. 578, 594 S.E.2d 756 (2004).

Cited in *Alpharetta, Old Milton County, Ga. Historical & Genealogical Soc'y, Inc. v. Dowda*, 217 Ga. App. 792, 459 S.E.2d 443 (1995); *Johnson v. Nelson-Rives Realty*, 245 Ga. App. 638, 538 S.E.2d 536 (2000); *Hubbard v. DOT*, 256 Ga. App. 342, 568 S.E.2d 559 (2002); *Williams v. Morgan*, 262 Ga. App. 848, 586

S.E.2d 740 (2003); *Delta Cleaner Supply Co. v. Mendel Drive Assocs.*, 286 Ga. App. 227, 648 S.E.2d 651 (2007); *DOT v. Gilbert's Auto Serv.*, 301 Ga. App. 419, 687 S.E.2d 659 (2009).

Application

1. In General

Dismissal of appeal, etc.

In accord with bound volume. See *Weiland v. Weiland*, 216 Ga. App. 417, 454 S.E.2d 613 (1995).

Court of appeals was unable to assess damages against appellants under O.C.G.A. § 5-6-6 because that statute did not authorize damages when an appeal was dismissed. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

Award of attorney's fees. — While O.C.G.A. § 5-6-6 and Ga. Ct. App. R. 15 allow the Court of Appeals of Georgia to

impose damages and penalties for frivolous appeals, they do not allow the court of appeals to award attorney fees for unjustified violations of the Open Meetings Act, O.C.G.A. § 50-14-1 et seq.; O.C.G.A. § 50-14-5 expressly vests jurisdiction to award such fees in the superior courts of Georgia, not in the court of appeals. *Evans County Bd. of Comm'rs v. Claxton Enter.*, 255 Ga. App. 656, 566 S.E.2d 399 (2002).

2. When Appeal Is Frivolous

Damages granted where appellant knew appeal ill-founded.

Motion for imposition of a frivolous appeal penalty, pursuant to O.C.G.A. § 5-6-6, was granted since all the issues raised by the appellant were meritless and pursued for purposes of delay only. *Shamsai v. Coordinated Props., Inc.*, 259 Ga. App. 438, 576 S.E.2d 901 (2003).

An appealing litigant was assessed frivolous appeal penalties, as was the litigant's counsel, in the amount of \$1,500 each, and a 10 percent penalty against the judgment against the litigant was also assessed, as a result of the litigant pursuing meritless claims and filing a wholly meritless appeal solely for the purpose of delay, even after the trial court gave repeated warnings not to pursue an appeal. *Austin v. Austin*, 292 Ga. App. 335, 664 S.E.2d 780 (2008).

Absent valid reason to anticipate reversal of judgment below, etc.

Court permitted damages for frivolous appeal where there was no reason for tenants to anticipate reversal of court's judgment and appeals must have been brought for purpose of delay. *Allen v. Peachtree Airport Park Joint Venture*, 231 Ga. App. 549, 499 S.E.2d 690 (1998).

Motion for 10 percent damages granted, etc.

See *International Indem. Co. v. Saia Motor Freight Line*, 223 Ga. App. 544, 478 S.E.2d 776 (1996); *Safadi v. Thompson*, 226 Ga. App. 685, 487 S.E.2d 457 (1997); *Yoh v. Daniel*, 230 Ga. App. 640, 497 S.E.2d 392 (1998); *Phillips & Sons Logging v. Pioneer Mach., Inc.*, 232 Ga. App. 240, 501 S.E.2d 585 (1998); *Sellers Bros., Inc. v. Imperial Flowers, Inc.*, 232 Ga. App. 687, 503 S.E.2d 573 (1998); *Marshall v. SDA, Inc.*, 234 Ga. App. 312, 506 S.E.2d

661 (1998); *Garrett v. McDowell*, 242 Ga. App. 78, 527 S.E.2d 918 (2000).

In an appeal of a proceeding in which an arbitrator's award in a home construction dispute was confirmed, the appealing homeowners were subject to a 10 percent penalty, under O.C.G.A. § 5-6-6, for a frivolous appeal, because they showed no basis for vacating the arbitrator's award, and no valid reason for them to anticipate the reversal of the trial court's confirmation of that award existed, so the appeal was brought only for purposes of delay. *Marchelletta v. Seay Constr. Servs.*, 265 Ga. App. 23, 593 S.E.2d 64 (2004).

Appeal by county of summary judgment in a breach of contract action was frivolous. — Summary judgment for a city for \$2,885,827 damages, plus pre-judgment interest under O.C.G.A. § 13-6-13, was proper on the city's claim against a county and its tax commissioner for breach of an agreement under which the county was required to collect the city's taxes and remit them to the city, but instead withheld \$2,885,827 for an obligation owed by the county. The county's appeal of the judgment was frivolous and subject to a ten percent penalty under O.C.G.A. § 5-6-6 and a \$2,500 penalty against both the county and its counsel under Ga. Ct. App. R. 15(b). *Ferdinand v. City of E. Point*, 301 Ga. App. 333, 687 S.E.2d 617 (2009).

3. When Appeal Not Frivolous

No purposeful delay found in meritless appeal. — Despite the appellate court's conclusion that an appeal lacked merit, the appellate court could not conclude that the appealing party pursued the appeal for purposes of delay only; hence, the appellee's motion for sanctions for a frivolous appeal under O.C.G.A. § 5-6-6 was denied. *Realty Lenders, Inc. v. Levine*, 286 Ga. App. 326, 649 S.E.2d 333 (2007).

Sanctions for a frivolous appeal under O.C.G.A. § 5-6-6 were not imposed against an insurer that appealed a subrogation award against the insurer as there was no indication that the appeal was pursued for purposes of delay only, although the appeal was lacking in merit. *Universal Underwriters Group v. South-*

ern Guar. Ins. Co., 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Motion for damages denied, etc.

In accord with *Ranger Constr. Co. v. Robertshaw Controls Co.* See *Signsation, Inc. v. Harper*, 218 Ga. App. 141, 460 S.E.2d 854 (1995); *Hendricks v. Blake & Pendleton, Inc.*, 221 Ga. App. 651, 472 S.E.2d 482 (1996); *Moss v. Rutzke*, 223 Ga. App. 58, 476 S.E.2d 770 (1996); *Warnock v. Davis*, 267 Ga. 336, 478 S.E.2d 124 (1996); *Newman v. Filsoof*, 224 Ga. App.

461, 481 S.E.2d 4 (1997); *Starrett v. Commercial Bank*, 226 Ga. App. 598, 486 S.E.2d 923 (1997).

Sanctions were denied where a doctor was successful on appeal in reversing an order requiring the doctor to pay attorney fees that the parties had mutually released in a settlement of all claims; the appeal was not frivolous and there was no merit in the motion for sanctions. *Carey v. Houston Oral Surgeons, LLC*, 265 Ga. App. 812, 595 S.E.2d 633 (2004).

5-6-8. Entry of decision on minutes; directions to lower court.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

1. IN GENERAL

Application

1. In General

Reversing condemnation judgment. Pursuant to this section, the judgment of the trial court setting aside a condemnation judgment would be upheld on condition that, within 20 days of re-

ceipt of the remittitur, the trial court would hold a hearing to determine the actual and necessary expenses incurred by the condemnee as the result of the county's error in condemning the wrong property. *Gatefield Corp. v. Gwinnett County*, 234 Ga. App. 621, 507 S.E.2d 164 (1998).

5-6-10. Transmittal of remittitur to lower court generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EFFECT OF REVERSAL

General Consideration

Cited in *Gold Kist, Inc. v. Wilson*, 247 Ga. App. 107, 542 S.E.2d 126 (2000).

Effect of Reversal

Repayment of funds tendered in attempt to satisfy trial court's judgment. — Appellate court's order reversing

the trial court's judgment in favor of plaintiff was enforceable, pursuant to O.C.G.A. § 5-6-10, and the trial court correctly ordered plaintiff to return money paid by defendant bank in an attempt to satisfy the judgment prior to appeal. *Blanton v. Bank of Am.*, 263 Ga. App. 284, 587 S.E.2d 411 (2003).

5-6-13. Granting of supersedeas in cases of contempt.

JUDICIAL DECISIONS

Grant of supersedeas is mandatory upon giving of required notice.

Trial court did not have discretion to grant or refuse a supersedeas in the mother's contempt case and should not have confined the mother to jail for two days as a mandatory halt was required after the mother submitted an application and written notice indicating her intention to seek an appeal of the civil contempt ruling against her. *Brinkley v. Flatt*, 256 Ga. App. 263, 568 S.E.2d 95 (2002).

Failure to give required notice for grant of supersedeas.

— Trial court did not err in refusing to grant supersedeas where there was no indication that the complainant submitted a written notice of intent to appeal and where there was no evidence that complainant complied with O.C.G.A. § 5-6-13. *Blake v. Spears*, 254 Ga. App. 21, 561 S.E.2d 173 (2002).

Cited in *In re Hughes*, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

5-6-14. Execution of extraordinary orders of Supreme Court.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 871.

5-6-15. Certiorari from Supreme Court to Court of Appeals.

Law reviews. — For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004).

JUDICIAL DECISIONS

Habeas petition improperly granted.

— Writ of habeas corpus granted to a prisoner was reversed because the prisoner had presented the same issues raised in a habeas petition to the trial court and relief had been denied, and the prisoner's appeal of that decision was rejected by the appellate courts; the prisoner's claim was procedurally barred. *Thompson v. Stinson*, 279 Ga. 196, 611 S.E.2d 29 (2005).

Habeas petition was untimely.

— Because a state prisoner did not appeal a conviction to the state supreme court, the conviction became final 10 days after the

appellate court affirmed the conviction, and the prisoner was not entitled to seek certiorari review to the U.S. Supreme Court under 28 U.S.C. § 1257(a). Thus, the habeas petition was untimely under 28 U.S.C. § 2244(d)(1)(A); although the Georgia Constitution circumscribed review by the state supreme court, the state supreme court placed no limit on its certiorari jurisdiction under Ga. Const. 1983, Art. VI, O.C.G.A. § 5-6-15, and Ga. Sup. Ct. R. 40. *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006).

Cited in *Jackson v. State*, 286 Ga. 407, 688 S.E.2d 351 (2010).

ARTICLE 2

APPELLATE PRACTICE

5-6-30. Purpose of article; construction.

JUDICIAL DECISIONS

Liberal construction.

Where the plaintiff failed to file enumerations of error as a separate document, but did set forth enumerations of error in her brief, it was apparent from the notice of appeal, the brief, the enumerations of error in that brief, and the record, exactly what judgment was appealed from and what errors were asserted, and a liberal construction of the appellate practice act required the court to exercise its discretion to reach the merits of the case. *Leslie v. Williams*, 235 Ga. App. 657, 510 S.E.2d 130 (1998).

Where the plaintiffs presented an enumeration of error in their appellate brief and it was apparent from that brief, the notice of appeal and the record what judgment was being appealed from and what error was being asserted, the appellate court considered the merits of the appeal to the extent it was supported by argument, citation to the record, and authority. *Reeder v. GMAC*, 235 Ga. App. 617, 510 S.E.2d 337 (1998).

Notice of appeal containing the petitioner's name, indicating the opposing party, specifying the case number and that the appeal involved an adverse ruling in petitioner's habeas corpus action satisfied the requirements of the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., and, in conjunction with the timely application for a certificate of probable cause, was sufficient to confer jurisdiction over the case upon the Supreme Court. *Hughes v. Sikes*, 273 Ga. 804, 546 S.E.2d 518 (2001).

Despite the deficiencies in the appellant's brief, which made it difficult for the court of appeals to determine what the case was even about, much less allow the court to perform any meaningful analysis of the asserted errors, given that the Appellate Practice Act was to be liberally construed so as to bring about a decision

on the merits of every case appealed and to avoid dismissal of any case, the appeals court declined to dismiss the appeal, opting instead to exercise its discretion to consider its merits. *Parekh v. Wimpy*, 288 Ga. App. 125, 653 S.E.2d 352 (2007), cert. denied, No. S08C0520, 2008 Ga. LEXIS 319 (Ga. 2008).

No application to all appeals. — While O.C.G.A. § 9-14-52(a) provides that appeals in habeas corpus cases shall be governed by the Appellate Practice Act (Act), O.C.G.A. § 5-6-30 et seq., that provision only means that appeals in habeas corpus cases, once begun, are to be handled in the same way as other civil appeals, and the Act does not provide for every single act involved in an appeal as there is no provision in the Act for computing time limits, and it is necessary to supplement the provisions of the Act by reference to O.C.G.A. § 9-11-6. *Head v. Thomason*, 276 Ga. 434, 578 S.E.2d 426, cert. denied, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

Cited in *Green v. State*, 226 Ga. App. 467, 486 S.E.2d 691 (1997); *Hipple v. Simpson Paper Co.*, 234 Ga. App. 516, 507 S.E.2d 156 (1998); *Adams v. State*, 234 Ga. App. 696, 507 S.E.2d 538 (1998); *Holy Fellowship Church of God in Christ v. First Community Bank*, 242 Ga. App. 400, 530 S.E.2d 24 (2000); *Blanton v. Duru*, 247 Ga. App. 175, 543 S.E.2d 448 (2000); *American Cent. Ins. Co. v. Lee*, 273 Ga. 880, 548 S.E.2d 338 (2001); *State v. Jones*, 283 Ga. App. 539, 642 S.E.2d 183 (2007); *Register v. Elliott*, 285 Ga. App. 741, 647 S.E.2d 406 (2007); *Coote v. Branch Banking & Trust Co.*, 292 Ga. App. 164, 664 S.E.2d 554 (2008); *Hann v. State*, 292 Ga. App. 719, 665 S.E.2d 731 (2008); *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009); *Benefield v. Tominich*, 308 Ga. App. 605, 708 S.E.2d 563 (2011).

5-6-31. Entry of judgment defined.

JUDICIAL DECISIONS

Judgment must be signed and filed for notice of appeal time to begin running. — O.C.G.A. § 5-6-31 plainly provides that the filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of the Appellate Practice Act, and as a result the 30-day limit under O.C.G.A. § 5-6-38(a) for filing a notice of appeal does not begin to run until a judgment, signed by the judge, is filed with the clerk; to the extent that *Ross v. State*, 259 Ga. App. 246 (2003) holds otherwise, it is hereby overruled. *Rocha v. State*, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Construction with Civil Practice Act. — What additional requirements are imposed by the Civil Practice Act, O.C.G.A. § 9-11-58(b), for entry of a judgment are not relevant for purposes of the Appellate Practice Act, O.C.G.A. §§ 5-6-31 and 5-6-38(a), which has its own definition of when a judgment is entered. *GMC Group, Inc. v. Harsco Corp.*, 293 Ga. App. 707, 667 S.E.2d 916 (2008).

Entry of oral order.

Because the notice of appeal was from an unappealable oral order, the appeal was dismissed and appellant's motion to remand was, therefore, moot. In the Interest of *W.P.B.*, 269 Ga. App. 101, 603 S.E.2d 454 (2004).

To the extent that a later contempt finding was based on the trial court's oral pronouncement, it was a nullity. In re *Tidwell*, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

Nunc pro tunc entry. — Under O.C.G.A. §§ 5-6-31 and 5-6-38(a), the 30-day time period for filing a notice of appeal did not begin to run until a judgment, signed by the judge, was filed with the clerk; thus, a defendant's appeal was timely, as the 30 days did not begin to run on the nunc pro tunc date, but on the date the signed judgment was filed. *Rocha v. State*, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

While a nunc pro tunc entry does not extend the statutory period for filing a notice of appeal, case law does not stand

for the proposition that a nunc pro tunc entry can shorten the statutory period for filing a notice of appeal provided in O.C.G.A. § 5-6-38(a), which begins to run when judgment is entered in accordance with O.C.G.A. § 5-6-31. *Rocha v. State*, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Change of decision after oral order.

— Because the trial court orally granted the bank's motion to dismiss for failure to state a claim but then the trial court granted the plaintiffs' motion for voluntary dismissal pursuant to O.C.G.A. § 9-11-41(a), the trial court was entitled to change its mind, as the oral decision had not been reduced to writing pursuant to O.C.G.A. § 5-6-31. *Wachovia Bank Savannah, N.A. v. Kitchen*, 272 Ga. App. 601, 612 S.E.2d 885 (2005).

Time for filing a motion for attorney fees. — As real property contestants failed to file a request for attorney fees pursuant to O.C.G.A. § 9-15-14 within 45 days following a trial court's final disposition in a real property proceeding, the trial court erred in granting the contestants' request because the court lacked jurisdiction to consider the motion; the time for filing the motion began to run when judgment was entered under O.C.G.A. § 5-6-31, and the time when a civil disposition form was filed under O.C.G.A. § 9-11-58(b) had no effect on the timing for purposes of the motion. *Horesh v. DeKinder*, 295 Ga. App. 826, 673 S.E.2d 311 (2009).

Relief from default judgment denied. — Petitioner was not entitled to relief from default judgment entered in favor of the judgment creditor because the petitioner did not seek relief from the default judgment until well outside the 60-day window pursuant to O.C.G.A. § 18-4-91. *W. Ray Camp, Inc. v. Cavalry Portfolio Servs., LLC*, 308 Ga. App. 597, 708 S.E.2d 560 (2011).

Cited in *Smith v. State*, 242 Ga. App. 459, 530 S.E.2d 223 (2000); *Zepp v. Brannen*, 283 Ga. 395, 658 S.E.2d 567 (2008).

5-6-32. Manner of service of notices and other papers upon parties; waiver or acknowledgment of service.

JUDICIAL DECISIONS

Cited in McKinney v. Jennings, 246 Ga. App. 862, 542 S.E.2d 580 (2000).

5-6-33. Right of appeal generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WHEN APPEAL LIES
WHO MAY APPEAL
CRIMINAL PROCEEDINGS

General Consideration

No waiver of right to trial by jury. — Because: (1) by repealing former provisions of O.C.G.A. § 5-3-30, the Georgia legislature intended that appeals from the probate court to the superior court would continue without special limitations on the right to a jury trial; and (2) de novo appeals to the superior court from the probate court were to be tried by jury unless the right to a jury trial was waived, given that a widow specifically requested a jury trial, and hence did not waive the right, the trial court erred in denying the widow's request. *Montgomery v. Montgomery*, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Cited in *In re Estate of Taylor*, 270 Ga. App. 807, 608 S.E.2d 299 (2004); *Burnett v. State*, 309 Ga. App. 422, 710 S.E.2d 624 (2011).

When Appeal Lies

Final decision or decree of court of record. — The court lacked jurisdiction over the caveator's appeal from a letter from the Director of Enforcement, Division of Securities & Business Regulation within the office of the Georgia Secretary of State informing him that the Secretary had no jurisdiction over the caveator's complaints, because the letter was not a final decision or decree by a superior, state or city court rendered in an actual case or

controversy instituted in a court of record. *Thierman v. Thierman*, 234 Ga. App. 716, 507 S.E.2d 489 (1998).

Sustaining motion to dismiss plea and overruling striking of plea.

Defendant who was convicted of malice murder, felony murder, and other offenses voluntarily, knowingly, and intelligently waived defendant's right to appeal defendant's conviction beyond filing a motion for a new trial, and the state supreme court dismissed an appeal which defendant filed after defendant's motion for a new trial was denied. *Rush v. State*, 276 Ga. 541, 579 S.E.2d 726 (2003).

No appeal from foreclosure. — After a valid foreclosure sale of Chapter 13 debtor's residence, O.C.G.A. § 5-6-33(a)(1) did not apply to create a right of appeal because foreclosure in Georgia did not involve any judgment, decision, or court decree. *Bishop v. GMAC Mortg., LLC (In re Bishop)*, No. 11-5055, 2011 Bankr. LEXIS 5123 (Bankr. M.D. Ga. Dec. 27, 2011).

Who May Appeal

Only party to case below can bring case to appellate court.

Subsequently-named corporation lacked standing to appeal from orders against the previously-named corporation, as that corporation was not a party to the litigation, was not granted or denied intervention pursuant to a motion to amend with leave of court, and an attempted substituo-

tion by the predecessor was more than an attempt to correct a misnomer. *Degussa Wall Sys. v. Sharp*, 286 Ga. App. 349, 648 S.E.2d 687 (2007), cert. denied, 2007 Ga. LEXIS 701 (Ga. 2007).

As neither a law firm nor the attorneys representing an employee were parties to the employer/employee litigation, and they never sought to be added as parties and were denied that option, the firm had no standing to appeal from the trial court's order granting the attorney fees to the employee's attorneys; thus, the law firm's appeal was dismissed. *Thaxton v. Norfolk Southern Corp.*, 287 Ga. App. 347, 652 S.E.2d 161 (2007).

The non-parties to the underlying case could not otherwise appeal a judgment; moreover, they lacked standing to challenge an award of attorney fees as a part of the judgment. *Rice v. Champion Bldgs.,*

Inc., 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Criminal Proceedings

Right to appeal. — Where a defendant sentenced to life in prison asserted that his failure to file a timely appeal was not due to any negligence on his part, and wished to exercise his right to appeal, the defendant's motion for out-of-time appeal was improperly denied without further inquiry or a hearing. *Randolph v. State*, 220 Ga. App. 769, 470 S.E.2d 300 (1996).

State appeal of order disqualifying district attorney. — The state did not have the right to appeal an order of the trial court disqualifying the district attorney from prosecuting a criminal defendant. *State v. Smith*, 268 Ga. 75, 485 S.E.2d 491 (1997).

RESEARCH REFERENCES

ALR. — Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction, 9 ALR2d 661; 70 ALR5th 587.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

5-6-34. (For effective date, see note) Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought; appeals involving nonmonetary judgments in child custody cases.

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover and contempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;

(6) Any ruling on a motion which would be dispositive if granted with respect to a defense that the action is barred by Code Section 16-11-173;

(7) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;

(8) All judgments or orders refusing applications for dissolution of corporations created by the superior courts;

(9) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will;

(10) (For effective date, see note) All judgments or orders entered pursuant to subsection (c) of Code Section 17-10-6.2;

(11) (For effective date, see note) All judgments or orders in child custody cases including, but not limited to, awarding or refusing to change child custody or holding or declining to hold persons in contempt of such child custody judgment or orders; and

(12) (For effective date, see note) All judgments or orders entered pursuant to Code Section 35-3-37.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, including but not limited to the denial of a defendant's motion to recuse in a criminal case, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application.

The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 45 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) In criminal cases involving a capital offense for which the death penalty is sought, a hearing shall be held as provided in Code Section 17-10-35.2 to determine if there shall be a review of pretrial proceedings by the Supreme Court prior to a trial before a jury. Review of pretrial proceedings, if ordered by the trial court, shall be exclusively as provided by Code Section 17-10-35.1 and no certificate of immediate review shall be necessary.

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot.

(e) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order. (Orig. Code 1863, § 4159; Code 1868, § 4191; Code 1873, § 4250; Code 1882, § 4250; Ga. L. 1890-91, p. 82, § 1; Civil Code 1895, § 5526; Penal Code 1895, § 1069; Civil Code 1910, § 6138; Penal Code 1910, § 1096; Code 1933, § 6-701; Ga. L. 1965, p. 18, § 1; Ga. L. 1968, p. 1072, § 1; Ga. L. 1975, p. 757, § 1; Ga. L. 1979, p. 619, §§ 1, 2; Ga.

L. 1984, p. 599, § 1; Ga. L. 1988, p. 1437, § 1; Ga. L. 1994, p. 347, § 1; Ga. L. 2001, p. 88, § 1; Ga. L. 2005, p. 20, § 2/HB 170; Ga. L. 2005, p. 224, § 2/HB 221; Ga. L. 2006, p. 379, § 2/HB 1059; Ga. L. 2006, p. 583, § 1/SB 382; Ga. L. 2007, p. 554, § 2/HB 369; Ga. L. 2011, p. 562, § 1/SB 139; Ga. L. 2012, p. 899, § 8-1/HB 1176.)

Delayed effective date. — Subsection (a), as set out above, becomes effective July 1, 2013. For version of subsection (a) in effect until July 1, 2013, see the 2012 amendment note.

The 2001 amendment, effective March 23, 2001, added paragraph (a)(5.1) and substituted “45 days” for “30 days” in the seventh sentence in subsection (b).

The 2005 amendments. — The first 2005 amendment, effective July 1, 2005, inserted “including but not limited to the denial of a defendant’s motion to recuse in a criminal case,” near the beginning of subsection (b). The second 2005 amendment, effective July 1, 2006, deleted “and” at the end of paragraph (a)(7), substituted “; and” for a period at the end of paragraph (a)(8), and added paragraph (a)(9).

The 2006 amendments. — The first 2006 amendment, effective July 1, 2006, in subsection (a), redesignated former paragraphs (5.1) and (6) through (9) as present paragraphs (6) through (10), respectively, deleted “and” at the end of paragraph (9), added “; and” at the end of paragraph (10), and added paragraph (11). The second 2006 amendment, effective April 28, 2006, delayed the effective date of the second 2005 amendment until January 1, 2007, and also, effective January 1, 2007, in subsection (a), added “and” at the end of former paragraph (7), substituted a period for “; and” at the end of former paragraph (8), and deleted former paragraph (9) [redesignated as paragraph (10) by the first 2006 amendment], which read: “All final judgments of child support”.

The 2007 amendment, effective January 1, 2008, in subsection (a), deleted “and” at the end of paragraph (a)(9), substituted “; and” for a period at the end of paragraph (a)(10), and added paragraph (a)(11).

The 2011 amendment, effective July 1, 2011, added subsection (e). See editor’s note for applicability.

The 2012 amendment, effective July 1, 2013, in subsection (a), deleted “and” at the end of paragraph (a)(10), substituted “; and” for the period at the end of paragraph (a)(11), and added paragraph (a)(12).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, “and” was added to the end of paragraph (a)(9), former paragraph (a)(10), which read: “Repealed; and” was deleted, and former paragraph (a)(11) was redesignated as present paragraph (a)(10).

Pursuant to Code Section 28-9-5, in 2009, “Code Section 16-11-173” was substituted for “Code Section 16-11-184” at the end of paragraph (a)(6).

Editor’s notes. — Ga. L. 2001, p. 88, § 3, not codified by the General Assembly, provides that: “This Act shall apply to any case pending on or brought after the effective date of this Act; and, for purposes of taking an appeal pursuant to the provisions of paragraph (5.1) of subsection (a) of Code Section 5-6-34 as enacted by this Act, any ruling actually entered before the effective date of this Act in any case which is pending on the effective date of this Act shall be deemed to have been entered on the effective date of this Act.” The effective date of this Act was March 23, 2001.

Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Criminal Justice Act of 2005.’”

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that this Act shall apply to all trials which commence on or after July 1, 2005.

Ga. L. 2005, p. 224, § 1, not codified by the General Assembly, provides that: “The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assem-

bly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and"

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2006, p. 583, § 8, not codified by the General Assembly, amended Ga. L. 2005, p. 224, § 13, so as to delay the effective date of the 2005 amendment to subsection (a) of this Code section until January 1, 2007.

Ga. L. 2006, p. 583, § 9, not codified by

the General Assembly, provided that it was the intention of the 2006 Act to delay for six months the effectiveness of the provisions of 2005 Act No. 52 (Ga. L. 2005, p. 224) of the General Assembly, excepting only those provisions of 2005 Act No. 52 (Ga. L. 2005, p. 224) creating the Georgia Child Support Commission which went into effect upon approval of that Act by the Governor.

Ga. L. 2006, p. 583, § 10(b), not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Ga. L. 2007, p. 554, § 1, not codified by the General Assembly, provides that: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8, not codified by the General Assembly, provides that the 2007 amendment applies to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 562, § 4, not codified by the General Assembly, provides that the amendment by that Act shall apply to all notices or applications for appeal filed on or after July 1, 2011.

Law reviews. — For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11, 103 (2006). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007). For survey article on administrative law, see 60 Mercer L. Rev. 1 (2008). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010). For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011).

JUDICIAL DECISIONS

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1. IN GENERAL
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General Consideration**1. Constitutionality and Purpose of Section**

Failure to comply with O.C.G.A. § 5-6-34(b). — Plaintiff's interlocutory appeal of a removal order transferring plaintiff's case to another county was dismissed because plaintiff failed to follow the interlocutory procedures set forth in O.C.G.A. § 5-6-34(b); although the removal order was issued by the original trial judge, the certificate of immediate review was issued by the trial judge in the other county following the transfer of the case, and because the certificate was not signed by the trial judge who issued the removal order, it was invalid and could not provide a basis for the exercise of jurisdiction by the court of appeals to consider the merits of plaintiff's appeal. *Mauer v. Parker Fibernet, LLC*, 306 Ga. App. 160, 701 S.E.2d 599 (2010).

Right to appeal. — Where a defendant sentenced to life in prison asserted that his failure to file a timely appeal was not due to any negligence on his part, and wished to exercise his right to appeal, the defendant's motion for out-of-time appeal was improperly denied without further inquiry or a hearing. *Randolph v. State*, 220 Ga. App. 769, 470 S.E.2d 300 (1996).

2. Construction in General

There can be no effective appeal from anything but a judgment, etc.

Where the appellate court assumed, without deciding, that a pending commercial lease controversy authorized a declaratory judgment directing the defendant would not be in breach of the lease by paying future rent according to an amendment, it held that, because a controversy remained pending below, the order granting that declaration was not a final judgment, and therefore that portion of the order granting declaratory judgment was not directly appealable, and the denial of defendant's motion for summary judgment was also not independently directly

appealable. *Yeazel v. Burger King Corp.*, 236 Ga. App. 110, 511 S.E.2d 237 (1999).

In a legal malpractice action, the appeals court held that it lacked jurisdiction to hear a lawyer's appeal from the trial court's order striking an untimely response to a motion for summary judgment, as: (1) no final judgment had been entered against the lawyer, who remained a defendant in the trial court; and (2) the lawyer failed to follow the procedures for appealing the interlocutory ruling on the motion to strike. *Stubbs v. Pickle*, 287 Ga. App. 246, 651 S.E.2d 171 (2007).

Subsection (d) is broad enough to permit a party to raise on the appeal of a directly appealable order issues regarding an order that, standing alone, is subject to the application requirements of O.C.G.A. § 5-6-35. *American Car Rentals, Inc. v. Walden Leasing, Inc.*, 220 Ga. App. 314, 469 S.E.2d 431 (1996).

O.C.G.A. § 5-6-34(d) grants the Court of Appeals of Georgia authority to review all judgments or rulings rendered in a case without regard to the appealability of that judgment or ruling. *Bradford v. State*, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

Because the Court of Appeals of Georgia had jurisdiction to hear appeals filed after punishment was imposed pursuant to a contempt order, any other non-final rulings entered in the case could also be raised as part of such a direct appeal, pursuant to O.C.G.A. § 5-6-34(d). *Harrell v. Fed. Nat'l Payables, Inc.*, 284 Ga. App. 395, 643 S.E.2d 875 (2007).

Compared with O.C.G.A. § 5-6-35.

While O.C.G.A. § 5-6-35(h) provides that the filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas, that section applies only to discretionary appeals. O.C.G.A. § 5-6-34(b), which applies to interlocutory appeals, does not so provide, but states that if the appellate court issues an order granting an appeal, the applicant may then timely file a notice of appeal and the notice of appeal shall act as a

supersedeas, as provided in O.C.G.A. § 5-6-46. *Nelson v. Haugabrook*, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Construed with § 5-6-35(a).

While a judgment or an order denying an application for injunctive relief, mandamus or other extraordinary relief is a judgment or order subject to direct appellate review, it is subject to the discretionary application procedure if the underlying subject matter of the appeal is one contained in § 5-6-35. *Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs.*, 265 Ga. 810, 462 S.E.2d 601 (1995).

Unless subject to O.C.G.A. § 5-6-35, all rulings and judgments are directly appealable when they dispose of all matters before the court; after entry of final judgment in a criminal matter and the filing of a notice of appeal, a motion for the trial court to appoint appellate counsel raises a new matter and when disposed of, the new ruling disposes of all matters before the court, and therefore it may be directly appealed. *Spear v. State*, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Underlying subject matter of a resident's suit seeking a writ of mandamus and other relief arising from the issuance of a building permit for the construction of a school building in the neighborhood concerned the review of an administrative zoning decision and, therefore, the appellate court had jurisdiction to address the merits only in the context of a discretionary appeal; while the trial court's order ruling against the resident was appealable under O.C.G.A. § 5-6-34(a), the resident was required to obtain permission to file the appeal, and could not circumvent the discretionary application requirements of O.C.G.A. § 5-6-35. *Ladzinske v. Allen*, 280 Ga. 264, 626 S.E.2d 83 (2006).

O.C.G.A. § 5-6-35(a)(8) requires that review of an order denying a motion to set aside be preceded by an application for discretionary review. When both O.C.G.A. §§ 5-6-34(a) and 5-6-35(a) are involved, an application for appeal is required when the underlying subject matter of the appeal is listed in § 5-6-35(a), even though the party may be appealing a judgment or order that is procedurally subject to a direct appeal under § 5-6-34(a). *Avren v.*

Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

Construction with O.C.G.A. § 9-10-53. — Although O.C.G.A.

§ 9-10-53 addresses the general conduct of further proceedings following a case transfer, O.C.G.A. § 5-3-34(b) sets forth the more specific rule governing the issuance of a certificate of immediate review for interlocutory appeals; it thus follows that the general provisions of O.C.G.A. § 9-10-53 cannot override the clear and specific provisions of O.C.G.A. § 5-6-34(b) mandating that the certificate of immediate review be issued by the trial judge who entered the order in question. *Mauer v. Parker Fibernet, LLC*, 306 Ga. App. 160, 701 S.E.2d 599 (2010).

No direct appeal from interlocutory order in probate court.

Where an order appealed from was for a partial accounting, and thus not directly appealable, it was interlocutory; thus, as claims remained below, where the appealing parties failed to follow the interlocutory appeal procedures, dismissal was warranted. *Geeslin v. Sheftall*, 263 Ga. App. 827, 589 S.E.2d 601 (2003).

When decision is not appealable under section.

Appeals court rejected an employee's claim that because the trial court had previously signed a certificate of immediate review of its original order denying summary judgment on the employee's claim for intentional infliction of emotional distress, the trial court lacked jurisdiction over the case at the time it amended the order by granting summary judgment in favor of the former employer and the former manager; as the trial court's order was not appealable, the trial court retained jurisdiction and thus was authorized to amend its order. *Wilcher v. Confederate Packaging, Inc.*, 287 Ga. App. 451, 651 S.E.2d 790 (2007).

Appeals from superior courts in traffic cases.

Any appeal from a superior court review under § 40-13-28 of any lower court, except the probate court, shall be under § 5-6-35(a); however, an appeal from the superior court review under § 40-13-28 of a traffic case from the probate court shall be by direct appeal under paragraph (a)(1)

of this section. *Power v. State*, 231 Ga. App. 335, 499 S.E.2d 357 (1998).

Discretionary appeal. — Trial court's order upholding the constitutionality of Georgia's Child Support Guidelines was erroneously certified by the trial court since the order did not dispose of any claim. However, since the appellate court had granted a father's application for discretionary appeal, the appellate court proceeded to a consideration of the merits of the constitutional issue. *Keck v. Harris*, 277 Ga. 667, 594 S.E.2d 367 (2004).

Cited in *Richardson v. GMC*, 221 Ga. App. 583, 472 S.E.2d 143 (1996); *Gist v. DeKalb Tire Co.*, 223 Ga. App. 397, 477 S.E.2d 616 (1996); *Gray v. Springs*, 224 Ga. App. 427, 481 S.E.2d 3 (1997); *Andemeskel v. Waffle House, Inc.*, 227 Ga. App. 887, 490 S.E.2d 550 (1997); *Postell v. State*, 233 Ga. App. 800, 505 S.E.2d 782 (1998); *Fulton County Tax Comm'r v. GMC*, 234 Ga. App. 459, 507 S.E.2d 772 (1998); *Reliance Ins. Co. v. Cobb County*, 235 Ga. App. 685, 510 S.E.2d 129 (1998); *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 243 Ga. App. 85, 532 S.E.2d 436 (2000); *Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon*, 242 Ga. App. 73, 529 S.E.2d 138 (2000); *Keller v. State*, 242 Ga. App. 150, 529 S.E.2d 167 (2000); *Sprayberry v. Dougherty County*, 273 Ga. 503, 543 S.E.2d 29 (2001); *ARA Health Servs. v. Stitt*, 250 Ga. App. 420, 551 S.E.2d 793 (2001); *Chambers v. Gwinnett Community Hosp., Inc.*, 253 Ga. App. 25, 557 S.E.2d 412 (2001); *Benedict v. Snead*, 253 Ga. App. 749, 560 S.E.2d 278 (2002); *St. Paul Fire & Marine Ins. Co. v. Clark*, 255 Ga. App. 14, 566 S.E.2d 2 (2002); *S. Healthcare Sys. v. Health Care Capital Consol., Inc.*, 275 Ga. 247, 563 S.E.2d 132 (2002); *The Ltd., Inc. v. Learning Childbirth Ctr., Inc.*, 255 Ga. App. 688, 566 S.E.2d 411 (2002); *DeKalb County v. Adams*, 262 Ga. App. 243, 585 S.E.2d 178 (2003); *Minor v. Barwick*, 264 Ga. App. 327, 590 S.E.2d 754 (2003); *Swanson v. Swanson*, 276 Ga. 566, 580 S.E.2d 526 (2003); *TJW Enters. v. Henry County*, 261 Ga. App. 547, 583 S.E.2d 144 (2003); *Frantz v. Piccadilly Place Condo. Ass'n*, 278 Ga. 103, 597 S.E.2d 354 (2004); *Williams v. Trammell*, 281 Ga. App. 590, 636 S.E.2d 757 (2006); *DaimlerChrysler v.*

Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006); *Dierkes v. Crawford Orthodontic Care, P.C.*, 284 Ga. App. 96, 643 S.E.2d 364 (2007); *Langfitt v. Jackson*, 284 Ga. App. 628, 644 S.E.2d 460 (2007); *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501 (2007); *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007); *In the Interest of E.W.*, 290 Ga. App. 95, 658 S.E.2d 854 (2008); *Ansley Marine Constr., Inc. v. Swanberg*, 290 Ga. App. 388, 660 S.E.2d 6 (2008); *Korowotny v. Outback Prop. Owners Ass'n*, 291 Ga. App. 236, 661 S.E.2d 857 (2008); *Ayer v. Norfolk Timber Inv., LLC*, 291 Ga. App. 409, 662 S.E.2d 221 (2008); *Spinner v. City of Dallas*, 292 Ga. App. 251, 663 S.E.2d 815 (2008); *Bunn v. State*, 284 Ga. 410, 667 S.E.2d 605 (2008); *City of Decatur v. DeKalb County*, 284 Ga. 434, 668 S.E.2d 247 (2008); *White v. Shamrock Bldg. Sys.*, 294 Ga. App. 340, 669 S.E.2d 168 (2008); *Sampler v. State*, 294 Ga. App. 174, 669 S.E.2d 195 (2008); *Haygood v. Tilley*, 295 Ga. App. 90, 670 S.E.2d 800 (2008); *Treu v. Humanism Inv., Inc.*, 284 Ga. 657, 670 S.E.2d 409 (2008); *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009); *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009); *Anthony Hill Grading, Inc. v. SBS Invs., LLC*, 297 Ga. App. 728, 678 S.E.2d 174 (2009); *Croft v. Croft*, 298 Ga. App. 303, 680 S.E.2d 150 (2009); *State v. Burks*, 285 Ga. 781, 684 S.E.2d 269 (2009); *Harris v. Williams*, 304 Ga. App. 390, 696 S.E.2d 131 (2010); *Avery Enters. v. Lyndhurst Builders, LLC*, 304 Ga. App. 353, 696 S.E.2d 389 (2010); *Lumsden v. Williams*, 307 Ga. App. 163, 704 S.E.2d 458 (2010); *Nelson v. Bd. of Regents of the Univ. Sys. of Ga.*, 307 Ga. App. 220, 704 S.E.2d 868 (2010); *Burnett v. State*, 309 Ga. App. 422, 710 S.E.2d 624 (2011); *Pierce v. State*, 289 Ga. 893, 717 S.E.2d 202 (2011); *Blackmore v. Blackmore*, 311 Ga. App. 885, 717 S.E.2d 504 (2011).

What Are Final, Appealable Judgments

Constitutionality of law appealable from oral ruling. — A distinct, oral ruling, reflected in a transcript is sufficient and need not be reduced to writing in order to invoke the Supreme Court of

Georgia's exclusive appellate jurisdiction in cases in which the constitutionality of a law has been drawn into question. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

Dismissal of complaint against one of two defendants.

Because an insured could not use a voluntary dismissal of one of the defendants as the vehicle for appellate review of rulings entered by the trial court more than 30 days from the filing of the notice of appeal, and no other final appealable ruling existed in the record, the insured's appeal was dismissed based on the appellate court's lack of jurisdiction. *Waye v. Continental Special Risks, Inc.*, 289 Ga. App. 82, 656 S.E.2d 150 (2007), cert. denied, 2008 Ga. LEXIS 392 (Ga. 2008).

Dismissal of claims where other claims pending not appealable order, etc.

In accord with *Church v. Bell*. See *Financial Inv. Group, Inc. v. Cornelison*, 238 Ga. App. 223, 516 S.E.2d 844 (1999).

Dismissal of complaint without prejudice for failure to file an expert's affidavit was a final judgment as to the defendants and was appealable under paragraph (a)(1). *Jordan, Jones & Goulding, Inc. v. Balfour Beatty Constr., Inc.*, 246 Ga. App. 93, 539 S.E.2d 828 (2000).

Verdict form was not an appealable final judgment. — "Verdict form" entered by the trial court in April 2008 did not constitute an appealable final judgment under O.C.G.A. § 5-6-34 so that a notice of appeal was untimely. The trial court specifically entered final judgment in July 2008, and the notice of appeal was filed within 30 days of that date. *Sunstate Indus. v. VP Group, Inc.*, 298 Ga. App. 269, 679 S.E.2d 824 (2009).

Partial taking condemnation order. — Because a partial taking condemnation order was not otherwise a final appealable judgment within the meaning of O.C.G.A. § 5-6-34(a), and the parties could have appealed by complying with the relevant interlocutory appeal requirements, but did not do so, the appeals court lacked jurisdiction to consider either the appeal or the cross-appeal; moreover, the superior court's rulings on the admissibility of

certain evidence constituted no judgment on the merits of any part of the appealing party's claim for just and adequate compensation. *Forest City Gun Club v. Chatham County*, 280 Ga. App. 219, 633 S.E.2d 623 (2006).

In absence of any judgment, ruling, or order rendered, etc.

Because the notice of appeal divested the trial court of jurisdiction, and thereby established the permissible parameters of the case on appeal, the order denying the motion for reconsideration was ineffective and did not constitute a judgment, ruling, or order rendered in the case within the meaning of O.C.G.A. § 5-6-34(d). *State v. White*, 282 Ga. 859, 655 S.E.2d 575 (2008).

Denial of request for appellate counsel. — Because defendant failed to file a timely direct appeal of the denial of defendant's request for appellate counsel, defendant was precluded from raising the same issue again; further, defendant had withdrawn from the appellate court the record from the original appeal, and therefore the appellate court did not know whether defendant attempted to raise the issue of appellate counsel during defendant's initial appeal; as the initial appeal had been decided, the issue was moot under O.C.G.A. § 5-6-48(b)(3). *Spear v. State*, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Grant of motion to set aside judgment, etc.

In accord with *Mayson v. Malone*. See *Hooper v. Taylor*, 230 Ga. App. 128, 495 S.E.2d 594 (1998).

The grant of an application to compel arbitration, etc.

In accord with *Pace Constr. Corp. v. Northpark Assocs.* See *Goshayeshi v. Mehrabian*, 232 Ga. App. 81, 501 S.E.2d 265 (1998).

A superior court's order dismissing an action by homeowners for the appointment of an arbitrator and referring the parties to arbitration before an entity specified in the homeowners' arbitration agreement with their builders was a final order dismissing the original action in its entirety, and the case was no longer pending in the superior court. Therefore, the judgment was directly appealable under

O.C.G.A. § 5-6-34(a)(1). *Torres v. Piedmont Builders, Inc.*, 300 Ga. App. 872, 686 S.E.2d 464 (2009).

Appeal from mandamus directly appealable. — A court order requiring a county to approve a landfill did not involve zoning, but the county's decision under § 12-8-25 to prevent a landfill close to its border, and an appeal from the order was considered an appeal from the grant of a writ of mandamus, which is a direct appeal. *Long v. FSL Corp.*, 268 Ga. 479, 490 S.E.2d 102 (1997).

Denial of motion to set aside, etc.

Although the denial of a motion to set aside a judgment was ordinarily subject to the discretionary appeal procedure, O.C.G.A. § 5-6-35(a)(8), the denial of a stepson's motion to set aside was reviewable in conjunction with the stepson's appeal from the superior court's judgment reviewing the probate court's decision because the superior court's judgment reviewing the probate court's decision was directly appealable under O.C.G.A. § 5-6-34(a)(1). *Bocker v. Crisp*, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Order granting a motion for entry of a default judgment against the grantee of property transferred by a judgment debtor, setting aside the deed from the debtor to the grantee, and placing the property back in the name of the debtor, was a final judgment within the meaning of this section. *Forrister v. Manis Lumber Co.*, 232 Ga. App. 370, 501 S.E.2d 606 (1998).

Order denying a motion for entry of a default judgment. — Appeal of an order denying a motion for a default judgment was reviewable because the order denying the motion for default judgment made findings of fact which barred the relief requested by the movant. The order left no issues remaining to be resolved, and constituted the trial court's final ruling on the merits of the action; the trial court left the parties with no further recourse in that court, in such circumstances, the order was a final judgment and the appeal was within the jurisdiction of the Court of Appeals of Georgia. *Standridge v. Spillers*, 263 Ga. App. 401, 587 S.E.2d 862 (2003).

Appeal from order denying motion

to dismiss indictment was dismissed.

— Because the trial court's order denying the defendant's motion to dismiss an indictment on immunity grounds under O.C.G.A. § 16-3-24.2 was not a final appealable order, the criminal matter was still pending below, and no other reason under O.C.G.A. § 5-6-34 was presented allowing an appeal from the same, the defendant's appeal was dismissed. *Crane v. State*, 281 Ga. 635, 641 S.E.2d 795 (2007).

Voluntary dismissal. — Plaintiff's own voluntary dismissal with prejudice of counts of her complaint did not constitute a final, appealable judgment for purposes of appellate review of rulings on the partial grant of summary judgment entered by the trial court more than 30 days from the filing of the notice of appeal. *Studdard v. Satcher, Chick, Kapfer, Inc.*, 217 Ga. App. 1, 456 S.E.2d 71 (1995).

Deferred ruling on request for interlocutory relief. — Trial court's decision to defer a ruling until a jury determined issues of fact effectively denied plaintiff's request for interlocutory relief and was equivalent to a refusal to grant an application for an interlocutory injunction, and the decision was directly appealable. *Georgia Power Co. v. Hunt*, 266 Ga. 331, 466 S.E.2d 846 (1996).

Denial of injunctive relief against zoning board. — Appeal from denial of injunction filed to enforce a zoning ordinance was not a superior court review of an administrative decision; it was therefore directly appealable under paragraph (a)(4) of this section, and did not fall under the purview of § 5-6-35(a)(1) so as to require the grant of an application for discretionary appeal. *Harrell v. Little Pup Dev. & Constr., Inc.*, 269 Ga. 143, 498 S.E.2d 251 (1998).

Denial of a motion to compel arbitration. — Although the denial of a motion to compel arbitration is subject to interlocutory appeal under subsection (b), the denial may also be appealed after final judgment. *Choate Constr. Co. v. Ideal Elec. Contractors*, 246 Ga. App. 626, 541 S.E.2d 435 (2000).

Lender's direct appeal from an order denying its motion to compel arbitration of a dispute under a loan agreement as to a borrower's spouse and the borrower's

cross-appeal from the same order were dismissed because such an order was not appealable except as an interlocutory appeal under O.C.G.A. § 5-6-34(b), which was not preempted by 9 U.S.C. § 16(a)(1)(B) of the Federal Arbitration Act, 9 U.S.C. §§ 1-16; therefore, the order was not directly appealable and the appellate court lacked jurisdiction over both appeals. *American Gen. Fin. Servs. v. Vereen*, 282 Ga. App. 663, 639 S.E.2d 598 (2006).

Georgia's procedural prohibition on the direct appeal of an order denying a motion to compel arbitration is not preempted by the provisions for direct appeal in 9 U.S.C. § 16(a)(1)(B) of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, because Georgia's prohibition on the direct appeal of such an order does not undermine the purposes or objectives of the FAA to enforce arbitration agreements; the certification of such an order for immediate appeal pursuant to O.C.G.A. § 5-6-34(b) provides parties with an avenue for seeking appellate review that is not inconsistent with the objectives of the FAA to enforce legitimate arbitration agreements, and while the denial of an application for interlocutory appeal may delay arbitration, such a delay is not tantamount to the failure to enforce valid arbitration agreements contrary to the objectives of the FAA. *American Gen. Fin. Servs. v. Vereen*, 282 Ga. App. 663, 639 S.E.2d 598 (2006).

Denial of motion to vacate class determination arbitration award. — Trial court's order denying a company's motion to vacate a class determination arbitration award was a final one under O.C.G.A. § 5-6-34(a)(1). Once the trial court concluded that the company did not comply with the limitation period set forth in O.C.G.A. § 9-9-13(a), nothing remained for the trial court's consideration; therefore, an appeal could not be considered interlocutory, and the company was not required to file an application for discretionary appeal as a prerequisite to the appellate court obtaining jurisdiction. *Cypress Communs., Inc. v. Zacharias*, 291 Ga. App. 790, 662 S.E.2d 857 (2008).

Denial of motion to enter valid judgment of sentence. — A trial court's

denial of a defendant's motion to enter a valid judgment of sentence is subject to appeal to the Court of Appeals under O.C.G.A. § 5-6-34(a). *Barraco v. State*, 252 Ga. App. 25, 555 S.E.2d 244 (2001).

Sentence prerequisite to appeal. — Appellate court erred in dismissing defendant's appeal of a multi-count case since the case was not final and subject to appeal until a sentence had been entered on each count of the indictment for which defendant was found guilty. *Keller v. State*, 275 Ga. 680, 571 S.E.2d 806 (2002).

Because the trial court did not either enter a written sentence or enter a written notation that the count merged into another for purposes of sentencing, the defendant's case was not ripe for appeal, even though the trial court did enter a written judgment of conviction and sentence on other counts of the indictment. *Bass v. State*, 284 Ga. App. 331, 643 S.E.2d 851 (2007).

Court's supplemental order was the grant of a mandatory injunction and was appealable. — Court's supplemental order directing a county to place an employee in another position was the grant of a mandatory injunction and was directly appealable, even though the entire case lacked finality because of a pending claim for lost wages. *Glynn County v. Waters*, 268 Ga. 500, 491 S.E.2d 370 (1997).

Order finding children deprived.

Order within a deprivation proceeding awarding temporary custody of a child to the child's paternal grandmother for a period of 24 months was a "final order" within the meaning of O.C.G.A. § 5-6-34(a)(1), from which the mother properly took a direct appeal within 30 days from the entry thereof; deprivation proceedings did not fall within the scope of O.C.G.A. § 5-6-35(a)(2), so no application for appellate review was required. In the *Interest of S.J.*, 270 Ga. App. 598, 607 S.E.2d 225 (2004).

Temporary order changing custody directly appealable. — Mother was permitted to appeal a temporary order changing custody of the parties' children to the father without complying with O.C.G.A. §§ 5-6-34(b) and 5-6-35 because § 5-6-34 provided that all modifications of child

custody orders filed on or after January 1, 2008 were directly appealable and were no longer subject to the interlocutory appeal procedures. *Taylor v. Curl*, 298 Ga. App. 45, 679 S.E.2d 80 (2009).

Because an order modified the custody of a mother's children, the order was directly appealable under O.C.G.A. § 5-6-34(a)(11) and was not subject to the interlocutory or discretionary appeal procedures. *Long v. Long*, 303 Ga. App. 215, 692 S.E.2d 811 (2010).

Order discontinuing reunification between parent and child was appealable. — In a deprivation case, an order of the juvenile court authorizing a county department of family and children services to discontinue efforts to reunite a child and her mother was a final appealable judgment. *In re S.A.W.*, 228 Ga. App. 197, 491 S.E.2d 441 (1997).

Ruling on petition to modify visitation was child custody case. — As a parent's petition to modify a visitation schedule was a "child custody case" for purposes of O.C.G.A. § 5-6-34(a)(11), and as the legislature intended to remove child custody cases from the operation of O.C.G.A. § 5-6-35(a)(2) when the legislature excised references to such cases from that statute, the parent was entitled to file a direct appeal from the trial court's final judgment on the petition. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Appeal of order finding no further unresolved issues. — Under O.C.G.A. § 5-6-34(a)(1), all prior rulings of the trial court were reviewable because the first partner timely appealed from the trial court's order finding that there were no further unresolved issues in a partnership dissolution case. *Barnaby v. Scott*, 299 Ga. App. 691, 683 S.E.2d 333 (2009), cert. denied, No. S10C0027, 2010 Ga. LEXIS 51 (Ga. 2010).

Materialman's action on a lien against property was not an action for damages necessitating a discretionary appeal from a judgment on the pleadings and the fact that the property owners chose to post a bond to satisfy any judgment on the lien did not change the nature of the underlying action. *Kelly v. Pierce Roofing Co.*, 220 Ga. App. 391, 469 S.E.2d 469 (1996).

Order to pay rent pending appeal.

— Similar to a postjudgment order requiring the posting of a supersedeas bond, a postjudgment order requiring the payment of rent pending appeal under O.C.G.A. § 44-7-56 is subject to direct appeal, as there is nothing left to be decided in the trial court. *Owens v. Green Tree Servicing LLC*, 300 Ga. App. 22, 684 S.E.2d 99 (2009).

Failure of superior court to fully adjudicate case on appeal from probate court.

— Where, in an appeal from an order of the probate court denying an executor's petition for compensation under § 53-6-143, the superior court's judgment, holding that the commission allowed as compensation was two and one half percent of the value of the property delivered in kind but not setting forth the property's value, was not final, as no final award of compensation was made, and the executor was required to follow interlocutory appeal procedures. *Clark v. Davis*, 242 Ga. App. 425, 530 S.E.2d 49 (2000).

Order denying substitution was not a final appealable order.

— Trial court's order denying substitution of the decedent's administrator as a party, in place of the decedent, was not a final appealable order and as such did not dismiss the complaint, but left issues remaining to be resolved. *Williams v. City of Atlanta*, 263 Ga. App. 113, 587 S.E.2d 261 (2003).

State could directly appeal from an order granting defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing by an uncertified laboratory because defendant filed only a post-conviction motion and did not file an extraordinary motion for new trial; the trial court had ruled on the merits of the only pending motion, there was no issue remaining, and a direct appeal would not create absurd results. *State v. Clark*, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Juvenile court's findings as to custody.

— Where a juvenile court's finding as to custody is in the nature of a recommendation to the superior court, the custody issue remains pending below and is not before the appellate court on appeal. *In the Interest of M.E.*, 265 Ga. App. 412, 593 S.E.2d 924 (2004).

Ruling on will construction. — Because a superior court's ruling in a pro-

bate matter was directed solely to the will construction issue placed before it by a removal proceeding pursuant to O.C.G.A. § 53-7-75, after which the superior court returned the case to the probate court, because the administration of the estate remained pending, the superior court order was not a final judgment, and since the decedent's daughter failed to comply with the interlocutory procedures in O.C.G.A. § 5-6-34(b), the appellate court was without jurisdiction to hear an appeal brought by the daughter. *Bandy v. Elmo*, 280 Ga. 221, 626 S.E.2d 505 (2006).

Delinquency adjudication. — Defendant juvenile's appeal of an order denying a motion to reconsider, vacate, or modify the delinquent adjudication was proper because the denial of the motion was a final judgment and was directly appealable; therefore, the defendant could appeal the ruling on disposition as well as on the original finding of delinquency. An order denying a motion under O.C.G.A. § 15-11-40(b) seeking a modification based on changed circumstances in a delinquency matter is a final judgment directly appealable under O.C.G.A. §§ 5-6-34(a)(1) and 15-11-3. In the Interest of J. L. K., 302 Ga. App. 844, 691 S.E.2d 892 (2010).

Compliance with the requirement of subsection (b). — In reviewing cases on appeal the court will not pass upon questions on which no final ruling has ever been made by the trial judge or where there is no compliance with the requirement of O.C.G.A. § 5-6-34(b) that the trial court certify its order for immediate review. *Smith & Wesson v. City of Atlanta*, 273 Ga. 431, 543 S.E.2d 16 (2001).

Opposing party's failure to appeal any alleged error regarding the sanctions order entered against the opposing party after a final judgment was entered in the declaratory judgment action in which the sanctions order was entered precluded the opposing party from challenging an error regarding entry of the sanctions order when the opposing party later appealed the contempt order entered against the opposing party for willfully violating the sanctions order by admittedly not paying the amount specified in that order. *Franklin v. Gude*, 259 Ga. App. 521, 578 S.E.2d 170 (2003).

Rulings Not Appealable Without Certificate

1. In General

Refusal to stay proceedings in another case. — Where, in a ruling on a request for a restraining order, interlocutory injunction, and stay of proceedings in another case, the court simply refused to stay the proceedings in the other case, concluding that it had no jurisdiction to do so, such order was not one which refused an interlocutory injunction and the interlocutory appeal procedure of this section applied. *Grange Mut. Cas. Co. v. Riverdale Apts.*, 218 Ga. App. 685, 463 S.E.2d 46 (1995).

Dismissal proper as judgment not final. — Appeal taken from two orders that appeared to be non-final, was dismissed; moreover, as no certificate of immediate review was obtained, and since no amendment was filed to correct the defect in the notice of appeal, no other recourse remained. *Southwest Health & Wellness, LLC v. Work*, 282 Ga. App. 619, 639 S.E.2d 570 (2006).

Order denying motion to suppress evidence, etc.

In accord with *Cody v. State*, 116 Ga. App. 331, 157 S.E.2d 496 (1967). See *Genter v. State*, 218 Ga. App. 311, 460 S.E.2d 879 (1995).

Grant of motions for change of venue. — Insureds were authorized to bring their action against their insurer, seeking uninsured motorist coverage, in the county of their residence pursuant to O.C.G.A. § 33-4-1(4) and, accordingly, the trial court erred in transferring their case to another county pursuant to the insurer's motion alleging improper venue; the matter of whether venue was proper was reviewable by the appellate court pursuant to O.C.G.A. § 5-6-34(d) where the insureds' matter had been dismissed by the trial court and they sought review thereof. *Morton v. Fuller*, 264 Ga. App. 799, 592 S.E.2d 460 (2003).

Pretrial bail order. — Where the defendant failed to follow the requisite interlocutory procedures to appeal the order setting his pretrial bond, the defendant's direct appeal was dismissed for lack of

jurisdiction. *Wimberly v. State*, 235 Ga. App. 388, 508 S.E.2d 699 (1998).

Order vacating prior order substituting parties, etc.

Where a court order expressly provided that attorney fees were awarded for the cost of bringing a motion for sanctions, and that damages for bad faith were yet to be determined, it was not an appealable judgment within the meaning of this section and, absent a certificate of reviewability, the notice of appeal as to that order was premature and properly dismissed. *Northen v. Mary Anne Frolick & Assocs.*, 235 Ga. App. 804, 510 S.E.2d 122 (1998).

Appeal from temporary alimony order. — A party seeking appellate review of an order awarding temporary alimony must comply with the interlocutory appeal procedure of this section. *Bailey v. Bailey*, 266 Ga. 832, 471 S.E.2d 213 (1996).

Order disqualifying counsel. — An order disqualifying plaintiff's counsel was not directly appealable. *Lassiter Properties, Inc. v. Davidson Mineral Properties, Inc.*, 230 Ga. App. 216, 495 S.E.2d 663 (1998).

Order interpreting settlement agreement. — Wife did not file a declaratory judgment action since the wife sought guidance with respect to provisions in a settlement agreement in order to compel a husband to provide the wife with additional funds; as the trial court's decision was interlocutory and the wife did not secure a certificate of immediate review, the discretionary appeal to resolve whether the trial court's declaratory ruling was appealable as a final judgment was dismissed. *Gelfand v. Gelfand*, 281 Ga. 40, 635 S.E.2d 770 (2006).

Appeal from superior court's review of use and enforcement of investigative powers of the board of medical examiners required discretionary appeal procedures. *Rankin v. Composite State Bd. of Medical Exmrs.*, 220 Ga. App. 421, 469 S.E.2d 500 (1996).

Judgment denying intervention, etc.

In accord with *Henderson v. Atlanta Transit Sys.*, 233 Ga. 82, 210 S.E.2d 4 (1974). See *Prison Health Servs., Inc. v.*

Georgia Dep't of Admin. Servs., 265 Ga. 810, 462 S.E.2d 601 (1995).

Because the great-grandparents failed to follow the interlocutory appeal procedure outlined in O.C.G.A. § 5-6-34(b) in appealing an order denying their motion to intervene in a deprivation action, the case remained pending below, and no final order had been entered, their appeal from that denial was dismissed. In the Interest of H.E.M., 283 Ga. App. 354, 641 S.E.2d 597 (2007).

Where trial of suit results in mistrial, there is no final judgment in case.

Trial court's rulings declaring a mistrial and making pretrial rulings for a new trial involving a judgment debtor did not fall within the provisions of O.C.G.A. § 5-6-34(d) and were not appealable; the case against the debtor remained pending below, although other claims involving the debtor's transferees had been resolved by a jury and were final. *Chapman v. Clark*, 313 Ga. App. 820, 723 S.E.2d 51 (2012).

Denial of a motion for pretrial bail, etc.

In accord with *Howard v. State*. See *Mullinax v. State*, 271 Ga. 112, 515 S.E.2d 839 (1999).

Orders denying state's motions to allow similar transaction evidence and for reconsideration not directly appealable. — Supreme court could not review the trial court's denial of the state's motion to allow similar transaction evidence and its motion for reconsideration because neither of these rulings was directly appealable; where the state appeals from one or more orders listed in O.C.G.A. § 5-7-1(a), O.C.G.A. § 5-6-34(d) does not authorize appellate review of any other ruling in the case because § 5-6-34(d) was not intended to apply to appeals pursuant to § 5-7-1 et seq. since the General Assembly deliberately omitted from § 5-6-34(d) appeals taken or authorized under § 5-7-1. *State v. Lynch*, 286 Ga. 98, 686 S.E.2d 244 (2009).

Application to appeal required. — Defendant's direct appeal from a trial court's grant of partial summary judgment in favor of plaintiff was dismissed for lack of jurisdiction because an application to appeal under O.C.G.A. § 5-6-35(a)

was required but not submitted. *Bullock v. Sand*, 260 Ga. App. 874, 581 S.E.2d 333 (2003).

Order granting a criminal defendant a new trial. — Upon an appeal by the state from an order granting the defendant a new trial, because the state failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the state's attempted appeal was nugatory and did not activate the appellate jurisdiction of the Supreme Court of Georgia. Accordingly, that appeal was dismissed. *State v. Ware*, 282 Ga. 676, 653 S.E.2d 21 (2007).

2. Motions to Dismiss

Order granting dismissal where counterclaim remained pending. —

Because an order dismissing a complaint, which left a counterclaim pending before the trial court, was not subject to the exception to the final judgment rule for grants of partial summary judgment, and the plaintiffs failed to follow the procedures for obtaining a certificate of immediate review under O.C.G.A. § 5-6-34(b), their appeal from the dismissal had to be dismissed as well. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Alleged violation of Interstate Agreement on Detainers not successfully appealed. — When defendant alleged that defendant's temporary removal from federal custody for arraignment on state charges, after which defendant was returned to federal custody, violated Article IV(e) of the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, and sought dismissal of the state charges, a direct appeal of the trial court's denial of defendant's motion was not authorized as a certificate of immediate review and a petition for interlocutory appeal were required, under O.C.G.A. § 5-6-34(b), and neither were present, and defendant was not appealing an alleged violation of the constitutional right to a speedy trial, under O.C.G.A. § 17-7-170. *Thomas v. State*, 276 Ga. 853, 583 S.E.2d 848 (2003).

3. Motions Regarding Default Judgments

Denial of plaintiff's motion for default judgment was not a final adjudica-

tion but an interlocutory ruling which was not directly appealable. *Ware v. Handy Storage*, 222 Ga. App. 339, 474 S.E.2d 240 (1996).

Because a trial court declined to issue a certificate of immediate review to a former inmate in the inmate's request to appeal the trial court's grant of county defendants' motion to open a default, pursuant to O.C.G.A. § 5-6-34(b), that issue remained pending below and, accordingly, the appellate court had no jurisdiction to review that matter under O.C.G.A. § 9-11-54. *Camp v. Coweta County*, 271 Ga. App. 349, 609 S.E.2d 695 (2005), vacated in part, 280 Ga. App. 852, 635 S.E.2d 234 (2006).

4. Rulings Concerning Counterclaims and Cross Actions

Order while complaint and counterclaim still pending. — The trial court's order cannot be considered a final judgment while the complaint and counterclaim are still pending. *Cotton v. Broad River Realty, Inc.*, 216 Ga. App. 306, 454 S.E.2d 183 (1995).

Cash distribution order while counterclaims remained pending. — In action to dissolve partnership, because the final dissolution remained pending, the defendant partner's counterclaim for fees and litigation expenses remained pending, and there was no express determination of finality; therefore, plaintiff was required to follow the procedures of this section in order to appeal the trial court's order directing certain cash payments and distributions based on its custodial evaluation of the firm's assets. *Eckland v. Hale & Eckland*, 231 Ga. App. 278, 498 S.E.2d 358 (1998).

Summary Judgments

1. Grants

Dismissal of caveat to probate of will. — Where, on appeal by caveators from summary judgment in favor of the proponents of a will, the decision was affirmed and, after remittitur, the superior court entered an order admitting the will to probate, final disposition of the action for the purposes of the time to request attorney fees under § 9-15-14 oc-

curred when that order was entered, not when the summary judgment motion was granted. *McConnell v. Moore*, 232 Ga. App. 700, 503 S.E.2d 593 (1998).

Dismissal for late filing. — Motion to dismiss an appeal on grounds that the appealing party failed to timely appeal an order granting summary judgment pursuant to O.C.G.A. § 5-6-38(a) was granted; moreover, the appeal was not taken from the final judgment entered in the case. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

Party may appeal grant of summary judgment, etc.

Motion to dismiss an appeal from an order granting partial summary judgment to some of the claims was not untimely filed, as the appealing party had the option to wait until a final judgment was entered in order to file an appeal, and they exercised that option; hence, the opposing party's motion to dismiss the appeal as untimely filed was denied. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

2. Denials

Direct appeal is not available from the denial of a motion for summary judgment. *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1, cert. denied, 528 U.S. 1046, 120 S. Ct. 580, 145 L. Ed. 2d 482 (1999).

Denial of summary judgment not rendered moot by entry of judgment. — In an action against an insurer to recover damages under a policy issued to a county board of education on behalf of a child injured by a backfiring school bus, the insurer's appeal from the denial of its motion for summary judgment was not rendered moot by the subsequent entry of a verdict and a judgment in favor of the child in a trial limited to damages; the denial of the motion could be reviewed as part of the insurer's direct appeal from the final judgment because the trial court's determination in denying the motion that the policy's medical payments provision did not satisfy O.C.G.A. § 20-2-1090 and that the policy's liability provision provided the requisite coverage was not considered at trial. *Coregis Ins. Co. v. Nelson*, 282 Ga. App. 488, 639 S.E.2d 365 (2006).

Compliance with requirements of section.

Because the Court of Appeals of Georgia granted an application for interlocutory appeal to the Department of Transportation in a slip and fall case, a city's cross-appeal was properly before the court. *Ga. DOT v. Strickland*, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Although the repair company did not obtain a certificate of immediate review from the trial court's order denying a renewed motion for summary judgment under O.C.G.A. § 9-11-56, the appellate court had jurisdiction to address an order denying the renewed motion for summary judgment under O.C.G.A. § 5-6-34(d); the appellate court had jurisdiction to address the trial court's order denying the company's motion for reconsideration under O.C.G.A. § 5-6-34(b), since the company had obtained a timely certificate of immediate review from the trial court's order denying its motion for reconsideration. *Gulfstream Aero. Servs. Corp. v. United States Aviation Underwriters, Inc.*, 280 Ga. App. 747, 635 S.E.2d 38 (2006).

An order dismissing an unauthorized appeal of an interlocutory order denying defendant's motion for summary judgment was not appealable absent compliance with interlocutory appeal procedures. *Rolleston v. Cherry*, 233 Ga. App. 295, 504 S.E.2d 504 (1998).

As the losing party on cross-motions for summary judgment, defendant was entitled to proceed under subsection (b) to seek an interlocutory appeal from the denial of its motion or, in the alternative, to file a direct appeal from the grant of plaintiff's motion pursuant to § 9-11-56(h); where defendant elected to invoke the interlocutory appeal procedure, the mere availability of the alternative of the direct appeal procedure would not be a factor in determining whether to grant an interlocutory appeal. *Southeastern Sec. Ins. Co. v. Empire Banking Co.*, 268 Ga. 450, 490 S.E.2d 372 (1997).

Premature appeal.

Denial of the state's motion for summary judgment or dismissal based on sovereign immunity was not a final judgment subject to direct appeal under the collat-

eral order doctrine. *State v. Gober*, 229 Ga. App. 700, 494 S.E.2d 724 (1998).

Judgments on Motions for New Trial

1. Grants

No authority to appeal the grant of a new trial. — State of Georgia was not able to appeal an order granting a new trial under O.C.G.A. § 5-6-34(d). *State v. Caffee*, No. S11A1529, 2012 Ga. LEXIS 344 (Mar. 19, 2012).

Injunctions and Restraining Orders

Interlocutory order.

Because a trial court denied a property owner's request for interlocutory injunctive relief against a county tax commissioner, that order was directly appealable pursuant to O.C.G.A. § 5-6-34(a)(4); accordingly, the commissioner's motion to dismiss the appeal was denied. *E-Lane Pine Hills, LLC v. Ferdinand*, 277 Ga. App. 566, 627 S.E.2d 44 (2005).

On an appeal filed pursuant to O.C.G.A. § 5-6-34(a)(4) from an order enjoining a city from imposing a tax against a utility pursuant to an ordinance, the appeals court found that the interlocutory injunction was erroneously ordered, given that the ordinance had not yet posed any imminent danger to that utility's financial interest, but, only a demand for the tax had been issued. *City of Willacoochee v. Satilla Rural Elec. Mbrshp. Corp.*, 283 Ga. 137, 657 S.E.2d 232 (2008).

Nature of order. — The nature of the order containing the underlying contested issues of law will govern the appellate path in the Court of Appeals under subsection (b) of this section. *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*, 220 Ga. App. 805, 470 S.E.2d 252 (1996), *aff'd*, 267 Ga. 177, 476 S.E.2d 587 (1996).

Jurisdiction over direct appeal of case involving injunctive relief not otherwise an "equity" case. — Where a case involved the grant or denial of an injunction as an ancillary matter, the Supreme Court's transfer of an interlocutory appeal application to the Court of Appeals was a binding determination that the case was not an "equity" case in the Supreme Court's general jurisdiction and the Court of Appeals had jurisdiction over direct

appeal of the case; overruling *Auto Cash, Inc. v. Hunt*, 216 Ga. App. 239, 454 S.E.2d 162 (1995). *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*, 267 Ga. 177, 476 S.E.2d 587 (1996).

A trial court order indefinitely extending a temporary restraining order against a party is the equivalent of a judgment granting an interlocutory injunction and is directly appealable. *Matrix Fin. Servs. v. Dean*, 288 Ga. App. 666, 655 S.E.2d 290 (2007).

Reversal required where court abused its discretion by not balancing equities. — Because an order granting the interlocutory injunction did not reflect that the trial court balanced the relative equities of the parties, which the party seeking the relief would have had to demonstrate entitlement to, the order had to be reversed, as the trial court abused its discretion. *Bernocchi v. Forcucci*, 279 Ga. 460, 614 S.E.2d 775 (2005).

Divorce decree also involving child custody. — Right to a direct appeal in child custody cases in O.C.G.A. § 5-6-34(a)(11) did not apply to a divorce decree in which child custody was an issue, even though the only relief sought on appeal pertained to the custody decision; the underlying subject matter was still the divorce action. Therefore, a parent was required to follow the discretionary appeal procedure of O.C.G.A. § 5-6-35, and the parent's direct appeal was dismissed. *Todd v. Todd*, 287 Ga. 250, 696 S.E.2d 323 (2010).

Trial court lacked authority to issue injunction. — Trial court lacked authority to grant a property owner's request for an injunction because the owner had no further recourse in the trial court and could not properly petition for injunctive relief two years after entry of a judgment awarding the owner damages in a trespass action; because the trespass action did not involve any other judgments or rulings deemed directly appealable under O.C.G.A. § 5-6-34(a), the exercise of jurisdiction by the Court of Appeals necessarily required a determination that the damages judgment was a final judgment within the meaning of that statute, that no issues remained to be resolved, and that the parties had no further recourse in

the trial court, and those findings were binding in all subsequent proceedings in the trial court and in the appellate courts. *Paine v. Nations*, 301 Ga. App. 97, 686 S.E.2d 876 (2009).

Judgments of Contempt

Direct appeals may be taken from contempt orders even if the contemnor is given the opportunity to purge the contempt before punishment is imposed. *Hamilton Capital Group, Inc. v. Equifax Credit Info. Servs.*, 266 Ga. App. 1, 596 S.E.2d 656 (2004).

The Supreme Court of Georgia declined to address error attached to a contempt finding in a wholly separate matter; moreover, the presented pointed to no evidence in the record that tied that case to the instant prosecution. *Hill v. State*, 281 Ga. 795, 642 S.E.2d 64 (2007).

Dismissal of father's motion for contempt in visitation hearing was directly appealable. — Under O.C.G.A. § 5-6-34(a)(11), a father had the right to a direct appeal from the trial court's dismissal of a motion for contempt against the mother for interference with the father's visitation with the children. *Dennis v. Dennis*, 302 Ga. App. 791, 692 S.E.2d 47 (2010).

No jurisdiction to consider contempt order. — Supreme court had no jurisdiction to consider a trial court's order holding a common law husband in contempt because the enumeration that addressed the contempt order was not predicated upon a proper and timely appeal from that order or from any other appealable order that encompassed that subsequent ruling since the contempt order was not prior to or contemporaneous with that final judgment such that it can be enumerated in the case pursuant to O.C.G.A. § 5-6-34(d) but was a subsequent ruling that the husband was not entitled to enumerate; a separate appeal was not proper in the absence of compliance with the discretionary appeal procedures set forth in O.C.G.A. § 5-6-35(a)(2), no application seeking discretionary review of the contempt order had ever been filed, and the record did not contain any transcript of the contempt hearing. Nor-

man v. Ault, 287 Ga. 324, 695 S.E.2d 633 (2010).

Review of Collateral Judgments, Rulings, or Orders

When collateral order directly appealable. — A collateral order is directly appealable if it (1) completely and conclusively resolves the issue appealed; (2) concerns an issue which is "substantially separate" from the basic issues presented in the complaint; and (3) would result in the loss of an important right and is "effectively unreviewable on appeal." *Department of Transp. v. Hardaway Co.*, 216 Ga. App. 262, 454 S.E.2d 167 (1995).

Because plaintiffs' claim under the Declaratory Judgment Act was independent of their claim under the Administrative Procedure Act (APA) and was directly appealable, plaintiffs could include their APA claim in their appeal under O.C.G.A. § 5-6-34(d) and were not required to file an application for appeal under O.C.G.A. § 5-6-35(a)(1). *Zitrin v. Ga. Composite State Bd. of Med. Examiners*, 288 Ga. App. 295, 653 S.E.2d 758 (2007), cert. denied, 2008 Ga. LEXIS 285 (Ga. 2008).

Other orders reviewable on direct appeal from denial of appeal from state to superior court. — On a debtor's appeal from a state court's denial of the debtor's appeal to the superior court, the Court of Appeals had jurisdiction of all the state court's rulings pursuant to O.C.G.A. § 5-6-34(d), which allowed review of other orders rendered in the case that may affect the proceedings and that were raised on appeal. *Roberts v. Windsor Credit Servs.*, 301 Ga. App. 393, 687 S.E.2d 647 (2009).

Having filed a notice of appeal from the grant of summary judgment, plaintiff could also appeal an order denying a motion to strike. *Pierce v. Wendy's Int'l, Inc.*, 233 Ga. App. 227, 504 S.E.2d 14 (1998).

Reporter's privilege. — Non-parties engaged in news gathering may file a direct appeal of an order denying them the statutory reporter's privilege under the collateral order exception to the final judgment rule. *In re Paul*, 270 Ga. 680, 513 S.E.2d 219 (1999).

Order requiring county to pay defendant's expenses. — A county may file a direct appeal from an order requiring it to pay a defendant's expenses in a murder case under the collateral order exception to the final judgment rule in O.C.G.A. § 5-6-34. *Fulton County v. State*, 282 Ga. 570, 651 S.E.2d 679 (2007).

Orders not appealable. — An order placing a freeze on a stroke victim's bank accounts did not fall under the collateral order exception to the final judgment rule, since it was not one of those types of orders to which the exception has been applied, and because it did not completely and conclusively resolve the issue appealed, did not concern an issue substantially separate from the basic issues presented in the complaint, and would not result in the loss of an important right. *Parker v. Kennon*, 235 Ga. App. 272, 509 S.E.2d 152 (1998).

Appealability of prior orders. — Although a condominium unit owner appealed from a trial court denial of a motion to extend time to file a notice of appeal, and the owner failed to file a notice of appeal from the trial court judgment on the jury verdict and from a prior order of contempt, the appellate court was able to address errors raised on appeal therefrom, to the extent discernable, under O.C.G.A. § 5-6-34(d). *Schroder v. Murphy*, 282 Ga. App. 701, 639 S.E.2d 485 (2006), cert. denied, 2007 Ga. LEXIS 220 (Ga. 2007).

Subsection (c) is inapplicable to nonappealable orders entered by trial court subsequent to appeal.

In a suit between a church and a minister, the trial court's order striking a portion of the minister's complaint was not a final adjudication of all claims, thereby entitling the minister to appeal. It was only a determination that the minister had waived the right to a jury trial under O.C.G.A. § 23-3-66 by not filing a jury demand before a hearing was held by a special master, and not that any of the claims themselves had been waived or otherwise disposed of. *Rhymes v. E. Atlanta Church of God, Inc.*, 284 Ga. 145, 663 S.E.2d 670 (2008).

State's ability to appeal defendant's choice to proceed without jury. — Al-

though a petition for a writ of prohibition was a separate civil proceeding which allowed for a final and appealable ruling regarding it, the determination of whether the state had a right to appeal a ruling was determined by the underlying subject matter, not the relief sought, and since the state was not statutorily authorized to appeal the denial of its objection to defendant's waiver of a jury trial in a criminal case, and the denial of its petition for writ of prohibition seeking to compel a jury trial, the state supreme court had to dismiss the state's appeal of the denial of its writ of prohibition since the state supreme court did not have jurisdiction to reverse the ruling after it had been denied and statutory law did not permit the state to appeal that ruling. *Howard v. Lane*, 276 Ga. 688, 581 S.E.2d 1 (2003).

Discovery orders. — Discovery orders are not directly appealable as an exception to the final judgment rule for appeal of collateral orders. *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 485 S.E.2d 525 (1997), overruling *Department of Trans. v. Hardaway*, 216 Ga. App. 262, 454 S.E.2d 167 (1995).

When attorneys for a defendant in a capital case served a subpoena regarding the funding of indigent services on the Executive Director of the Georgia Public Defender Standards Council, the Council's appeal from the denial of Council's motion to quash was directly appealable under the collateral order doctrine. It involved matters that were unrelated to the basic issues to be decided in the criminal case; an appeal would conclusively resolve the discovery issue; and the important rights of a number of indigent capital defendants would be compromised if the Council had to await final judgment before seeking review. *Britt v. State*, 282 Ga. 746, 653 S.E.2d 713 (2007).

Discovery sanction not directly appealable. — In a civil suit, an appellate court properly dismissed an appeal of an order finding the appellants in contempt for violating a discovery order and that dismissed the answer and entered a default judgment as to liability as the order was not directly appealable as a contempt judgment under O.C.G.A. § 5-6-34(a)(2)

since the order did not impose a civil or criminal contempt sanction but rather imposed a discovery sanction under O.C.G.A. § 9-11-37(b)(2)(C). *Am. Med. Sec. Group, Inc. v. Parker*, 284 Ga. 102, 663 S.E.2d 697 (2008).

Denial of motion to dismiss based on sovereign immunity. — Patient sued the Board of Regents of the University System of Georgia alleging the board failed to notify the patient that transfusions given at a college hospital might have exposed the patient to HIV. Although the trial court's order denying the board's motion to dismiss was not a final judgment and was not directly appealable by statute, as the order was based on a conclusive determination that the board was not immune from suit on the basis of sovereign immunity, the order was appealable under the collateral order doctrine. *Bd. of Regents v. Canas*, 295 Ga. App. 505, 672 S.E.2d 471 (2009).

Moot Issues

Procedural defects cured. — Where an attorney did not claim that there were procedural defects in the entry of an appealed order, which contained findings of fact and conclusions of law relating to a previous order compelling the release of a client's file, any procedural defects with regard to the previous order were cured and the attorney's claims relating to the procedural defects in the previous order were rendered moot for purposes of O.C.G.A. § 5-6-34(d). *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

Failure to seek interlocutory appeal. — Where plaintiff could have taken an interlocutory appeal of the trial court's denial of plaintiff's motion to dismiss and plea in abatement but instead of appealing let the suit go to judgment, even assuming the proceedings would properly have been abated, the question of abatement became moot when the proceedings moved to a judgment. *MNM 5, Inc. v. Anderson/6438 N.E. Partners, Ltd.*, 215 Ga. App. 407, 451 S.E.2d 788 (1994).

Appeal deemed moot and dismissed. — Patients' appeal of a judgment entered against the patients in a medical malpractice action on the ground that it

was error to grant a motion to transfer filed by a hospital and corporation pursuant to the forum non conveniens statute, O.C.G.A. § 9-10-31.1, was dismissed as moot because the patients admitted in their appellate brief that their case had already been adjudicated, and they asserted no trial error nor any other error in the Cobb County Superior Court; therefore, any determination by the Court of Appeals regarding whether the Fulton County Superior Court was authorized under the forum non conveniens statute to transfer their case to Cobb County Superior Court for adjudication would be an abstract exercise unrelated to any existing facts or rights. *Lamb v. Javed*, No. A09A2234, 2010 Ga. App. LEXIS 44 (Jan. 19, 2010).

Application

1. In General

Failure to comply with subsection (b).

A party that sought and was granted an interlocutory appeal from the denial of its motion for summary judgment, but failed to timely file its notice of appeal in compliance with subsection (b), committed a procedural default fatal to its appeal and was foreclosed from resubmitting the matter for appellate review. *International Indem. Co. v. Robinson*, 231 Ga. App. 236, 498 S.E.2d 795 (1998).

Where defendant permitted the vacation of a court order in conjunction with transfer of the entire case for jury trial, the judgment appealed from was not final within the meaning of paragraph (a)(1) and defendant's appeal was dismissed for failure to comply with subsection (b). *Dobbs v. Atkinson*, 238 Ga. App. 151, 517 S.E.2d 597 (1999).

Given that paragraphs 12 and 13 of the superior court's "final judgment and decree of divorce" provided 90 days for action by the parties, the propriety of which action would be open to review by the trial court, and made a spouse's application for discretionary appeal therefrom interlocutory in nature, when the spouse failed to follow the interlocutory appeal procedures set out in O.C.G.A. § 5-6-34(b), the application was dismissed. *Miller v. Miller*, 282 Ga. 164, 646 S.E.2d 469 (2007).

As a church's suit against a minister involved multiple claims, and the trial court's decision adjudicated fewer than all of them, in order to appeal, the minister had to either: (1) obtain entry of judgment under O.C.G.A. § 9-11-54(b) based on a finding of no just reason for delay; or (2) obtain a certificate allowing immediate appeal under O.C.G.A. § 5-6-34(b). Because neither § 5-6-34(b) nor § 9-11-54(b) was followed, the minister's appeal was premature. *Rhymes v. E. Atlanta Church of God, Inc.*, 284 Ga. 145, 663 S.E.2d 670 (2008).

Certification of class action. — Attorneys, who were divided by the trial court into two classes, were not required to seek an interlocutory appeal from that ruling, and they were permitted by O.C.G.A. § 5-6-34(d) to raise the trial court's rulings on certification on appeal from a final judgment; thus, the City of Atlanta's argument in the tax refund case that it had relied upon the denial of certification as to one of two classes of attorneys with regard to a tax refund failed. *Barnes v. City of Atlanta*, 281 Ga. 256, 637 S.E.2d 4 (2006).

When an application is transferred from one appellate court to the other, the 30-day time period is to be computed from the date of the filing in the court to which said application has been transferred. *Marr v. Georgia Dep't of Educ.*, 264 Ga. 841, 452 S.E.2d 112 (1995).

Untimely filed notice of appeal, etc.

Disposition of a motion for an out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal; Georgia's courts have long recognized the right to effective assistance of counsel on appeal from a criminal conviction, and have permitted out-of-time appeals if the appellant was denied the right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of the appellant's appeal rights. *Copeland v. State*, 264 Ga. App. 905, 592 S.E.2d 540 (2003).

Other claims pending.

An order that merely dismissed a complaint but did not dispose of a counterclaim was not a final appealable judgment. *Hogan Mgt. Servs. v. Martino*, 225 Ga. App. 168, 483 S.E.2d 148 (1997).

Mother's challenge to deprivation order. — Because a mother's challenge to the unappealed February 11, 2004 deprivation order was brought on April 29, 2004, as part of a timely appeal from the April 21, 2004 disposition order entered in the same deprivation proceeding, motions filed by the Department of Children and Family Services requesting that the mother's appeals be dismissed were denied. In the Interest of S.P., 282 Ga. App. 82, 637 S.E.2d 802 (2006).

Denial of motion to modify in child deprivation proceeding. — The phrase "child custody cases" within the meaning of O.C.G.A. § 5-6-34(a)(11) does not include a child deprivation proceeding in which a custody order has been entered; however, the decision to terminate reunification services is a final judgment directly appealable under O.C.G.A. §§ 5-6-34(a)(1) and 15-11-3. In re J. N., 302 Ga. App. 631, 691 S.E.2d 396 (2010).

Order denying litigation directly appealable with termination order. — Although an order denying a putative father's petition to legitimate his minor child was subject to the discretionary appeal procedure under O.C.G.A. § 5-6-35(a)(2), it was directly appealable under O.C.G.A. § 5-6-34(d) where the father filed the appeal together with an appeal from the trial court's decision to terminate his parental rights. In the Interest of T.A.M., 280 Ga. App. 494, 634 S.E.2d 456 (2006).

Order granting motion to enforce settlement agreement regarding custody. — Wife was entitled to file a direct appeal under O.C.G.A. § 5-6-34(a)(11) of an order granting a husband's motion to enforce a settlement agreement regarding child custody and visitation because the final custody order predicated the award of child custody and visitation on the settlement agreement, not on the allegations of the divorce complaint addressed in a temporary hearing or trial; therefore, the relevant legal action for jurisdictional purposes was the husband's motion to enforce the settlement agreement, and since that motion was filed in 2008, the wife was authorized to file a direct appeal in the case. *Martinez v. Martinez*, 301 Ga. App. 330, 687 S.E.2d 610 (2009).

Visitation orders. — Mother could not object on appeal to an order that was entered on her motion to enforce an agreement between her and her children's grandmother regarding the grandmother's visitation with the children because the order was entered by the mother's agreement. The mother's direct appeal was proper under O.C.G.A. § 5-6-34(a)(11). *Hargett v. Dickey*, 304 Ga. App. 387, 696 S.E.2d 335, cert. dismissed, No. S10C1688, 2010 Ga. LEXIS 911 (Ga. 2010).

Divorce case involving child custody. — Mother's appeal of a judgment vacating an award of physical custody of a child to her and revising the decree to award physical custody of the child to the father was properly before the supreme court because the mother followed the required application procedures, and the timing of her notice of appeal did not deprive her of the appeal; because it was not a child custody case but a divorce case in which child custody was an issue, O.C.G.A. § 5-6-35(a)(2) required an application for discretionary appeal, and a direct appeal was not authorized by O.C.G.A. § 5-6-34(a)(11). *Todd v. Todd*, 287 Ga. 250, 696 S.E.2d 323 (2010).

Although a divorce decree determines, among other things, child custody, such determination does not transform it into a "child custody case" as that phrase is used in O.C.G.A. § 5-6-34(a)(11) because a divorce action is not a child custody proceeding but is a proceeding brought to determine whether a marriage should be dissolved, O.C.G.A. § 19-5-1 et seq.; all other issues in a divorce action, including child custody, are merely ancillary to that primary issue. *Todd v. Todd*, 287 Ga. 250, 696 S.E.2d 323 (2010).

Wife's appeal of a judgment granting a husband's motion under O.C.G.A. § 9-11-60(d)(2) to set aside an order awarding the wife sole legal and physical custody of the parties' children, eliminating the husband's right of visitation, and increasing the husband's child support obligations was a "custody case" subject to direct appeal pursuant to O.C.G.A. § 5-6-34(a)(11); the grant of a motion to set aside in a child custody case is directly appealable, and an action seeking to

change visitation qualifies for treatment as a "child custody case". *Edge v. Edge*, 290 Ga. 551, 722 S.E.2d 749 (2012).

Direct appeal in a child custody case. — Custodial parent had a right under O.C.G.A. § 5-6-34(a)(11) to appeal directly from a judgment or order in a child custody case that refused to change custody and that held the parent in contempt of a child custody judgment or order. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Lis pendens. — Husband's motion on appeal for cancellation of a lis pendens entered in favor of his wife pursuant to O.C.G.A. § 44-2-136 was not considered because the propriety of the ruling by the trial court denying cancellation of the lis pendens was not enumerated as error on appeal, and the matter was not properly before the appellate court pursuant to O.C.G.A. § 5-6-34(d). *Gardner v. Gardner*, 276 Ga. 189, 576 S.E.2d 857 (2003).

Post-judgment discovery. — The general rule that orders regarding discovery during the pendency of litigation must be appealed under the application procedures of subsection (b) apply to post-judgment discovery. *Supple v. Atwood*, 223 Ga. App. 677, 478 S.E.2d 473 (1996).

Construed with 5-6-35(a). — Where an action arose as a petition for inspection and copying of corporate records, the matter was correctly before the appellate court by direct appeal under section 5-6-34(a)(1). *Motor Whse., Inc. v. Richard*, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

Motion to lift a freeze on bank accounts. — The court's order denying a motion to lift a freeze on a stroke victim's bank accounts was not a final judgment or any other type of judgment that was directly appealable. *Parker v. Kennon*, 235 Ga. App. 272, 509 S.E.2d 152 (1998).

Motion for transcript treated as mandamus petition. — Defendant's post-conviction motion for a trial transcript at government expense was treated as a mandamus petition. *Coles v. State*, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

Denial of petition for writ of mandamus. — Injured parties' petition for a writ of mandamus was properly denied as the injured parties could have appealed from an order denying their motion seek-

ing the recusal of a judge in a malpractice action under O.C.G.A. § 5-6-34(a)(1) and (d) when they sought the extraordinary relief of a writ of mandamus. *Whitley v. Schwall*, 279 Ga. 726, 620 S.E.2d 827 (2005).

Denial of motion to recuse a trial court should have been raised in earlier appeal on the merits. — Appellate court reviewing a grant of attorney's fees against a litigant would not consider the denial of the litigant's motion to recuse the trial judge on the second appeal of the case because the denial of the motion to recuse could have been raised by the litigant in the litigant's earlier appeal of the case but was not. *Jones v. Unified Gov't of Athens-Clarke County*, 312 Ga. App. 214, 718 S.E.2d 74 (2011), cert. denied, 2012 Ga. LEXIS 228 (Ga. 2012).

Judgment in mandamus action subject to direct appeal. — Even though appellant doctor sought review of a decision by appellee board of medical examiners by filing a mandamus action, and even though a judgment in a mandamus action was subject to direct appeal under O.C.G.A. § 5-6-34, the doctor was required to file an application to appeal pursuant to O.C.G.A. § 5-6-35 because the underlying subject matter of the doctor's appeal was covered by O.C.G.A. § 5-6-35. *Ferguson v. Composite State Bd. of Med. Exam'rs*, 275 Ga. 255, 564 S.E.2d 715 (2002).

Judgment on arbitration award not final. — Limited liability company's appeal was dismissed as the order was not a final judgment under O.C.G.A. § 5-6-34(a)(1) since the matter had been remanded for an arbitrator's clarification of one invoice, the arbitrator had entered a clarification ruling, and the clarification ruling formed no part of the judgment; a subcontractor's cross-appeal was dismissed for the same reason. *Johnson Real Estate Invs., LLC v. Aqua Indus.*, 275 Ga. App. 532, 621 S.E.2d 530 (2005).

Order overruling exceptions to auditor's report.

Voluntary dismissal without prejudice was not a "final termination" of the case, and so the 45-day "window of opportunity" for moving for penalties and attorneys fees pursuant to O.C.G.A. § 9-15-14 did

not begin to run with plaintiff's voluntary dismissal of plaintiff's complaint without prejudice, and plaintiff's motion for penalties and attorney fees was timely; however, the award of attorneys fees was vacated and the case was remanded where the trial court's judgment contained no findings of conduct that authorized the award. *Meister v. Brock*, 268 Ga. App. 849, 602 S.E.2d 867 (2004).

Order overruling plea in bar. — The trial court's order overruling a plea in bar was directly appealable. *Langlands v. State*, 282 Ga. 103, 646 S.E.2d 253 (2007).

Order concerning transfer of tax funds. — Citizens' appeal was dismissed for lack of jurisdiction because the trial court's orders denying the citizens interlocutory injunctive relief and authorizing a city and development authority to transfer disputed tax funds to a school system were not subject to direct appeal; the trial court's order authorizing the city and development authority to transfer disputed tax funds to the school system for the school's general purposes was an amendment of the trial court's order granting an interlocutory injunction and was a finding by the trial court that a final order in appellants' favor was unlikely, and the order denying the citizens an interlocutory injunction was not a ruling on an issue raised in the parties' cross-motions for partial summary judgment, which remained pending in the trial court. *Clark v. Atlanta Indep. Sch. Sys.*, 311 Ga. App. 255, 715 S.E.2d 668 (2011).

Order on emergency motion directly appealable. — Trial court erred in dismissing an employee's notice of appeal challenging the grant of an employer's emergency motion because the trial court's order on the emergency motion was directly appealable, and, therefore, the order dismissing the notice of appeal from the order on the emergency motion was, itself, directly appealable under O.C.G.A. § 5-6-34(a)(4), and the Court of Appeals had jurisdiction to consider the appeal; the trial court's order on the emergency motion was, in effect, a mandatory permanent injunction because it required the employee to provide the employer details about prior settlements and insurance coverage in the underlying tort suit,

and it prohibited the employee from settling any claims or going to trial unless she complied with O.C.G.A. § 33-24-56.1. *Lamb v. Salvation Army*, 301 Ga. App. 325, 687 S.E.2d 615 (2009).

Appellate jurisdiction to review grant of summary judgment in conversion claims. — Court of appeals had appellate jurisdiction to review the grant of summary judgment in favor of a bank on the bank's conversion claim against a real estate firm because the grant of summary judgment was directly appealable under O.C.G.A. § 9-11-56(h), and the firm's cross-appeal of that grant of summary judgment could stand on the firm's own merits; because the court of appeals

had jurisdiction to review the grant of summary judgment in favor of the bank on the bank's conversion claim, the court also had jurisdiction pursuant to O.C.G.A. § 5-6-34(d) to review the denial of the firm's motion for summary judgment on that same issue. *Trey Inman & Assocs., P.C. v. Bank of Am., N.A.*, 306 Ga. App. 451, 702 S.E.2d 711 (2010).

2. Certificates of Immediate Review

Substantial compliance with requirements adequate. — A certificate which substantially complied with the language of subsection (b) was sufficient to allow appeal. *Clayton v. Edwards*, 225 Ga. App. 141, 483 S.E.2d 111 (1997).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 2.

ALR. — Inattention of juror for sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

Appealability of interlocutory or pendente lite order for temporary child custody, 82 ALR5th 389.

5-6-35. Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal; appeals involving nonmonetary judgments in child custody cases.

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is \$2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(5.1) Appeals from decisions of superior courts reviewing decisions of the Sexual Offender Registration Review Board;

(5.2) Appeals from decisions of superior courts granting or denying petitions for release pursuant to Code Section 42-1-19;

(6) Appeals in all actions for damages in which the judgment is \$10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14;

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal; and

(12) Appeals from orders terminating parental rights.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or

transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain habeas corpus cases.

(j) When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

(k) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the

reviewing court unless the trial court states otherwise in its judgment or order. (Ga. L. 1979, p. 619, §§ 3, 6; Ga. L. 1982, p. 3, § 5; Ga. L. 1984, p. 22, § 5; Ga. L. 1984, p. 599, § 2; Ga. L. 1986, p. 1591, § 2; Ga. L. 1988, p. 1357, § 1; Ga. L. 1991, p. 412, § 1; Ga. L. 1994, p. 347, § 2; Ga. L. 1997, p. 543, § 1; Ga. L. 2007, p. 554, § 3/HB 369; Ga. L. 2010, p. 168, § 1/HB 571; Ga. L. 2011, p. 562, § 2/SB 139.)

The 1997 amendment, effective April 14, 1997, added subsection (j).

The 2007 amendment, effective January 1, 2008, in subsection (a), in paragraph (a)(2), deleted “child custody,” following “alimony,” deleted “, awarding or refusing to change child custody,” following “permanent alimony” near the middle, and deleted “or child custody” following “such alimony” near the end, deleted “and” at the end of paragraph (a)(10), substituted “; and” for a period at the end of paragraph (a)(11), and added paragraph (a)(12).

The 2010 amendment, effective May 20, 2010, added paragraphs (a)(5.1) and (a)(5.2).

The 2011 amendment, effective July 1, 2011, added subsection (k). See editor’s note for applicability.

Law reviews. — For article, “Appellate Practice and Procedure,” see 63 Mercer L. Rev. 67 (2011).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, “(a) of this Code section” was substituted for “(a) of this Code Section” in the first sentence of subsection (j).

Editor’s notes. — Ga. L. 2007, p. 554, § 1, not codified by the General Assembly, provides that: “The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in

the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8, not codified by the General Assembly, provides that the 2007 amendment applies to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 562, § 4, not codified by the General Assembly, provides that the amendment by that Act shall apply to all notices or applications for appeal filed on or after July 1, 2011.

For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of Administrative Law, see 57 Mercer L. Rev. 1 (2005). For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010). For article, “Administrative Law,” see 63 Mercer L. Rev. 47 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION

1. IN GENERAL
2. JUDGMENTS CONCERNING CHILD CUSTODY
3. DIVORCE
4. GARNISHMENT

5. REVOCATION OF PROBATION
6. DAMAGES WHERE JUDGMENT IS \$10,000.00 OR LESS
7. APPEALS UNDER § 9-11-60
8. ATTORNEY'S FEES OR EXPENSES
9. ZONING CASES
10. CRIMINAL CASES

General Consideration

Construction with other law. — In an action on a credit card contract brought by a creditor, the debtor's voluntary dismissal of an appeal from an order granting the creditor summary judgment before the case was ever docketed served to dismiss the debtor's direct appeal, even though the trial court did not enter a formal dismissal order; thus, the appellate court lacked jurisdiction to hear the same, and a payment of appeal costs became moot. *Ghee v. Target Nat'l Bank*, 282 Ga. App. 28, 637 S.E.2d 742 (2006), cert. denied, 2007 Ga. LEXIS 62 (Ga. 2007), 552 U.S. 859, 128 S. Ct. 141, 169 L.Ed.2d 97 (2007).

Applicability.

An award of attorney fees need not be appealed through the discretionary application process when a direct appeal from the underlying judgment is pending. *Cagle v. Davis*, 236 Ga. App. 657, 513 S.E.2d 16 (1999).

Discretionary application requirement of Georgia Prison Litigation Reform Act, O.C.G.A. § 42-12-8, was inapplicable to an injured party's renewed personal injury suit because the injured party was not a prisoner when the *de novo* action was filed. *Baskin v. Ga. Dep't of Corr.*, 272 Ga. App. 355, 612 S.E.2d 565 (2005).

Because a city could have challenged an agency consent order under O.C.G.A. § 12-2-2(c), O.C.G.A. § 50-13-19, but did not, the city's appeal of a judgment to enforce the consent order did not fall under O.C.G.A. § 5-6-35(a)(1), but arose from proceedings under O.C.G.A. § 12-5-189; since the city did not appeal the director's decision, the appellate issue was limited to the propriety of the judgment and not the correctness of the decision. *City of Rincon v. Couch*, 272 Ga. App. 411, 612 S.E.2d 596 (2005).

Property owners were allowed to file a direct appeal of the dismissal of their two

latest lawsuits challenging zoning decisions related to a proposed private school near or contiguous to their property; the property owners' appeal was not one from the decision of a court reviewing the decision of an administrative agency within the meaning of O.C.G.A. § 5-6-35(a)(1), and, thus, they were not required to file an application for a discretionary appeal. *Harrell v. Fulton County*, 272 Ga. App. 760, 612 S.E.2d 838 (2005).

Although a former employer failed to properly serve papers, including a summary judgment motion, on the former employee's counsel at the counsel's new address, despite a change of address having been provided, pursuant to Ga. Ct. App. R. 1(a) and Ga. Ct. App. R. 6, the appellate court denied the employee's motion to dismiss the appeal and, instead, it reviewed the matter on the merits; the improper service was asserted as a ground for an award of attorney fees, pursuant to O.C.G.A. § 9-15-14, and such award would be subject to appellate review under O.C.G.A. § 5-6-35(a)(10). *Whimsical Expressions, Inc. v. Brown*, 275 Ga. App. 420, 620 S.E.2d 635 (2005).

While the failure to move for a directed verdict barred a party from contending on appeal that said party was entitled to a judgment as a matter of law because of insufficient evidence, such did not bar the party from contending their entitlement to a new trial on that ground, as fairness dictated that a party who has failed to move for a directed verdict at trial should not be able to obtain a judgment as a matter of law on appeal based on the contention the evidence was insufficient to support the verdict. *Aldworth Co. v. England*, 281 Ga. 197, 637 S.E.2d 198 (2006).

Construed with § 5-6-34(d).

While a judgment or an order denying an application for injunctive relief, mandamus or other extraordinary relief is a judgment or order subject to direct appellate review under O.C.G.A. § 5-6-34, it is

subject to discretionary application procedure if the underlying subject matter of the appeal is one contained in this section. *Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs.*, 265 Ga. 810, 462 S.E.2d 601 (1995).

Required contents of application.

Because a grandparent failed to request review of a custody order through the application procedures of O.C.G.A. § 5-6-35 in a timely manner, the grandparent's application was dismissed. In the *Interest of J.R.P.*, 287 Ga. App. 621, 652 S.E.2d 206 (2007), cert. denied, 2008 Ga. LEXIS 207 (Ga. 2008).

Effect of grant of discretionary appeal. — When the court of appeals granted a discretionary appeal under this section, the trial court was without authority to find such appeal to be frivolous and the denial of supersedeas bond on that ground was an abuse of discretion as a matter of law and fact. *Farmer v. State*, 216 Ga. App. 515, 455 S.E.2d 297 (1995).

Timely filing of the notice of appeal, etc.

In accord with *White v. White*. See *Barnes v. Justis*, 223 Ga. App. 671, 478 S.E.2d 402 (1996).

Where an application for discretionary review was not filed, and a subsequent notice of direct appeal was filed untimely, there was no jurisdiction conferred on the court to hear the appeal. *Boney v. State*, 236 Ga. App. 179, 510 S.E.2d 892 (1999).

Filing before granting of application is timely.

Where the plaintiff had filed its initial application for discretionary review nearly four months before the trial court's order denying plaintiff's motion for a new trial, the order was void and a nullity, and provided no jurisdictional basis for an appeal. *Department of Human Resources v. Holland*, 236 Ga. App. 273, 511 S.E.2d 628 (1999), overruled on other grounds, *Cooper v. Spotts*, 309 Ga. App. 361, 710 S.E.2d 159 (2011).

Where applicable, requirements of this section are jurisdictional, etc.

In accord with *Boyle v. State*. See *Serpentfoot v. Salmon*, 225 Ga. App. 478, 483 S.E.2d 927 (1997); *Brown v. E.I. du Pont de Nemours & Co.*, 240 Ga. App. 893, 525 S.E.2d 731 (1999).

Appellate court did not have jurisdiction to consider the county's direct appeal of the trial court's affirmance of the administrative agency's decision against the county, as the county was required to file an application for discretionary review of a trial court's affirmance of an administrative agency's decision, and since the county did not do so, the county's appeal had to be dismissed. *Coweta County v. Jackson*, 264 Ga. App. 17, 589 S.E.2d 839 (2003).

Effect of filing application. — By filing applications for discretionary appeal, the parties divested the trial court of jurisdiction to enter orders on the parties' motions for reconsideration. *Nest Inv., Inc. v. Tzavaras*, 221 Ga. App. 282, 471 S.E.2d 223 (1996).

A temporary protective custody order was subject to appeal by discretionary action under this section. *Williams v. Stepler*, 221 Ga. App. 338, 471 S.E.2d 284 (1996).

De novo appeal from magistrate court. — In accord with bound volume. See *Strachan v. Meritor Mtg. Corp. E.*, 216 Ga. App. 82, 453 S.E.2d 119 (1995); *Southtowne Hyundai-Isuzu-Suzuki v. Hooper*, 216 Ga. App. 214, 453 S.E.2d 756 (1995).

Appeals from the denial of a motion, etc.

Although the denial of a motion to set aside a judgment was ordinarily subject to the discretionary appeal procedure, O.C.G.A. § 5-6-35(a)(8), the denial of a stepson's motion to set aside was reviewable in conjunction with the stepson's appeal from the superior court's judgment reviewing the probate court's decision because the superior court's judgment reviewing the probate court's decision was directly appealable under O.C.G.A. § 5-6-34(a)(1). *Bocker v. Crisp*, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Order denying discovery, etc.

All appeals from decisions of the superior court reviewing decisions of the commissioners of the department of revenue, with the exception of cases involving ad valorem taxes, are by discretionary appeal. *Bankers Trust Co. v. Jackson*, 236 Ga. App. 490, 512 S.E.2d 378 (1999).

Appeal from review of auditor's report. — Where the auditor did not submit

a final report containing separate findings of fact and conclusions of law for the superior court's review, the judgment of the court was directly appealable. *McCaughy v. Murphy*, 267 Ga. 64, 473 S.E.2d 762 (1996).

Discretionary appeal. — Trial court's order upholding the constitutionality of Georgia's Child Support Guidelines was erroneously certified by the trial court since the order did not dispose of any claim. However, since the appellate court had granted a father's application for discretionary appeal, the appellate court proceeded to a consideration of the merits of the constitutional issue. *Keck v. Harris*, 277 Ga. 667, 594 S.E.2d 367 (2004).

Cited in *Castro v. Hidden Village Apts.*, 216 Ga. App. 248, 453 S.E.2d 815 (1995); *Weiland v. Weiland*, 216 Ga. App. 417, 454 S.E.2d 613 (1995); *Hill v. Rose Elec. Co.*, 220 Ga. App. 603, 469 S.E.2d 844 (1996); *Thibadeau v. Hendon*, 221 Ga. App. 258, 471 S.E.2d 52 (1996); *Adivari v. Sears, Roebuck & Co.*, 221 Ga. App. 279, 471 S.E.2d 59 (1996); *Smoak v. Department of Human Resources*, 221 Ga. App. 257, 471 S.E.2d 60 (1996); *In re J.C.H.*, 224 Ga. App. 708, 482 S.E.2d 707 (1997); *Kappelmeier v. Homer*, 226 Ga. App. 379, 486 S.E.2d 612 (1997); *Clark v. Davis*, 242 Ga. App. 425, 530 S.E.2d 49 (2000); *NF Invs., Inc. v. Whitfield*, 245 Ga. App. 72, 537 S.E.2d 207 (2000); *Consolidated Gov't v. Barwick*, 274 Ga. 176, 549 S.E.2d 73 (2001); *McCormick v. Harris*, 253 Ga. App. 417, 559 S.E.2d 158 (2002); *Amaechi v. Lib Props., Ltd.*, 254 Ga. App. 74, 561 S.E.2d 137 (2002); *City of Warner Robins v. Baker*, 255 Ga. App. 601, 565 S.E.2d 919 (2002); *McKenna v. Dupree*, 285 Bankr. 759 (Bankr. M.D. Ga. 2002); *State v. Huckeba*, 258 Ga. App. 627, 574 S.E.2d 856 (2002); *Gulledge v. State*, 276 Ga. 740, 583 S.E.2d 862 (2003); *Giles v. Vastakis*, 262 Ga. App. 483, 585 S.E.2d 905 (2003); *Rainey v. Lange*, 261 Ga. App. 491, 583 S.E.2d 163 (2003); *Shelley v. Shannon*, 267 Ga. App. 582, 601 S.E.2d 131 (2004); *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006); *Michna v. Blue Cross & Blue Shield of Ga., Inc.*, 288 Ga. App. 112, 653 S.E.2d 377 (2007); *Atmos Energy Corp. v. Ga. PSC*, 290 Ga. App. 243, 659 S.E.2d 385 (2008); *Ponder v. CACV of*

Colo., LLC, 289 Ga. App. 858, 658 S.E.2d 469 (2008); *Smith v. State*, 283 Ga. 376, 659 S.E.2d 380 (2008); *Atmos Energy Corp. v. Ga. PSC*, 290 Ga. App. 243, 659 S.E.2d 385 (2008); *Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (2008); *Stone v. Stone*, 295 Ga. App. 783, 673 S.E.2d 283 (2009); *In the Interest of H.L.H.*, 297 Ga. App. 347, 677 S.E.2d 396 (2009); *Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753, 681 S.E.2d 203 (2009); *In the Interest of C.B.*, 300 Ga. App. 278, 684 S.E.2d 401 (2009); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011); *Blackmore v. Blackmore*, 311 Ga. App. 885, 717 S.E.2d 504 (2011); *Udoinyion v. Michelin N. Am., Inc.*, 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Application

1. In General

Appeals from the denial of extraordinary motions for new trial, etc.

The procedure for discretionary appeals applied to an appeal from the denial of an extraordinary motion for a new trial. *Balkcom v. State*, 227 Ga. App. 327, 489 S.E.2d 129 (1997), overruling *Walls v. State*, 204 Ga. App. 348, 419 S.E.2d 344 (1992).

Construction with O.C.G.A. § 5-6-34. — While O.C.G.A. § 5-6-35(h) provides that the filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas, that section applies only to discretionary appeals. O.C.G.A. § 5-6-34(b), which applies to interlocutory appeals, does not so provide, but states that if the appellate court issues an order granting an appeal, the applicant may then timely file a notice of appeal and the notice of appeal shall act as a supersedeas, as provided in O.C.G.A. § 5-6-46. *Nelson v. Haugabrook*, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Construction with Declaratory Judgment Act. — Because plaintiffs' claim under the Declaratory Judgment Act was independent of their claim under the Administrative Procedure Act (APA) and was directly appealable, plaintiffs could include their APA claim in their

appeal under O.C.G.A. § 5-6-34(d) and were not required to file an application for appeal under O.C.G.A. § 5-6-35(a)(1). *Zitrin v. Ga. Composite State Bd. of Med. Examiners*, 288 Ga. App. 295, 653 S.E.2d 758 (2007), cert. denied, 2008 Ga. LEXIS 285 (Ga. 2008).

Request for Deoxyribonucleic Acid (DNA) testing. — O.C.G.A. § 5-5-41(c)(13) emphasizes the Georgia General Assembly's intent that the denial of a motion seeking DNA testing that is made as part of an extraordinary motion for a new trial be recognized as an appealable issue, but the filing of an application for discretionary appeal is the proper form of appeal in such a case. Concluding otherwise would yield the absurd result that the denial of an extraordinary motion for a new trial would be appealable only as a discretionary appeal while the denial of a motion seeking DNA testing filed as part of that extraordinary motion for new trial would be appealable directly. *Crawford v. State*, 278 Ga. 95, 597 S.E.2d 403, cert. denied, stay denied, 542 U.S. 954, 125 S. Ct. 5, 159 L. Ed. 2d 837 (2004).

Actions filed by prisoners. — A non-prisoner defendant is required to follow the discretionary application procedures when appealing an action filed by a prisoner. *Ray v. Barber*, 273 Ga. 856, 548 S.E.2d 283 (2001).

Failure to comply with procedures. — The Court of Appeals was deprived of jurisdiction over appeal from a prisoner's civil action concerning medical treatment he received where he failed to comply with discretionary procedures as required by § 42-12-8. *Botts v. Givens*, 223 Ga. App. 139, 476 S.E.2d 816 (1996).

Appeal seeking review of a trial court's declaratory judgment which extended the term of a charter school from the charter issued by a county board of education was required to follow the discretionary appeal requirements of O.C.G.A. § 5-6-35; because the appeal was not made by application as required, the appeal was subject to dismissal. *Cox v. Academy of Lithonia, Inc.*, 280 Ga. App. 626, 634 S.E.2d 778 (2006).

Prisoner's failure to comply with discretionary appeal procedures in appealing from the trial court's denial of

his pro se petition for mandamus required dismissal of the action. *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997).

Appeals from decisions of superior courts, etc.

Where the underlying subject matter was the decision of a trial court reviewing the decision of a state administrative agency, appellate review was required to be secured by the grant of an application for discretionary appeal. *Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs.*, 265 Ga. 810, 462 S.E.2d 601 (1995).

The decision of the local school board in this case to appeal the State Board's decision to the superior court constituted a decision of a local administrative agency within the meaning of this section. As such, a direct appeal to the appellate court from the superior court's final disposition was not authorized. *Gurley v. Gordon County Bd. of Educ.*, 231 Ga. App. 481, 498 S.E.2d 64 (1998).

The Georgia Supreme Court could only review the decision of a superior court involving the review of a local zoning board decision by granting an application to appeal to the party seeking to have such superior court decision reviewed; it did not have jurisdiction to review a direct appeal. *Powell v. City of Snellville*, 275 Ga. 207, 563 S.E.2d 860 (2002).

Appeal from a decision of the superior court reviewing a decision of a magistrate court by a de novo proceeding was subject to the discretionary appeal procedures of this section. *Dean's Catering v. Sturm & Assocs.*, 231 Ga. App. 202, 498 S.E.2d 786 (1998).

Appeal from a ruling on a declaratory judgment, etc.

In accord with *Miller v. Georgia Dep't of Pub. Safety*. See *Greenburg v. Griffith*, 226 Ga. App. 818, 487 S.E.2d 411 (1997).

Appeals from temporary restraining orders. — Although paragraph (a)(9) makes appeals from temporary restraining orders subject to the procedural requirements of this section, such an order may be directly appealable if it is entered following a lengthy adversary hearing and effectively grants plaintiff all of the relief he or she seeks. *Dolinger v. Driver*, 269 Ga. 141, 498 S.E.2d 252 (1998).

Appeal from board of commissioners. — An appeal in a case involving the board of county commissioners' removal from office of a person appointed to that office by the board required compliance with discretionary appeal procedure; overruling *Parsons v. Chatham County Bd. of Comm'rs*, 204 Ga. App. 139(1), 418 S.E.2d 459 (1992); *Geron v. Calibre Cos.*, 250 Ga. 213(1), 296 S.E.2d 602 (1982). *Swafford v. Dade County Bd. of Comm'rs*, 266 Ga. 646, 469 S.E.2d 666 (1996).

Appeal dismissed as moot. — County board of education member's appeal of a judgment denying a request to reverse the governor's order removing the member from office under O.C.G.A. § 45-10-4 for violating O.C.G.A. § 45-10-3 was dismissed because the term to which the member had originally been elected expired. *Roberts v. Deal*, No. S11A1515, 2012 Ga. LEXIS 297 (Mar. 19, 2012).

Appeal dismissed where no application.

Where a father's petition for legitimation was denied, the appellate court did not have jurisdiction to review the order because the father had failed to follow the discretionary procedures to appeal pursuant to O.C.G.A. § 5-6-35(a)(2), nor did he file his application for such review within the time period allowed by § 5-6-35(d); his appeal from an order terminating his parental rights and allowing adoption of the minor by the stepfather, pursuant to O.C.G.A. § 19-8-1 et seq., was also denied where the issues that the father raised related to the lack of a hearing on his legitimation proceeding, which was already determined to be not reviewable. In the *Interest of C.M.L.*, 260 Ga. App. 502, 580 S.E.2d 276 (2003).

Defendant's direct appeal from a trial court's grant of partial summary judgment in favor of plaintiff was dismissed for lack of jurisdiction because an application to appeal under O.C.G.A. § 5-6-35(a) was required but not submitted. *Bullock v. Sand*, 260 Ga. App. 874, 581 S.E.2d 333 (2003).

Child support.

Father's appeal from superior court's order under § 19-11-12, modifying the amount of his child support obligation, should have been brought as a discretion-

ary appeal. *Fitzgerald v. Department of Human Resources*, 231 Ga. App. 129, 497 S.E.2d 659 (1998).

When an application is transferred from one appellate court to the other, the 30-day time period is to be computed from the date of the filing in the court to which said application has been transferred. *Marr v. Georgia Dep't of Educ.*, 264 Ga. 841, 452 S.E.2d 112 (1995).

Appeal of denial of motion to set aside, etc.

O.C.G.A. § 5-6-35(a)(8) requires that review of an order denying a motion to set aside be preceded by an application for discretionary review. When both O.C.G.A. §§ 5-6-34(a) and 5-6-35(a) are involved, an application for appeal is required when the underlying subject matter of the appeal is listed in § 5-6-35(a), even though the party may be appealing a judgment or order that is procedurally subject to a direct appeal under § 5-6-34(a). *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Appeal from legitimation proceeding, etc.

Direct appeal of an order terminating putative father's parental rights was proper, even where the relief he sought was expressed in terms of overturning the denial of his petition to legitimate. In re *D.S.P.*, 233 Ga. App. 346, 504 S.E.2d 211 (1998).

Although an order denying a putative father's petition to legitimate his minor child was subject to the discretionary appeal procedure under O.C.G.A. § 5-6-35(a)(2), it was directly appealable under O.C.G.A. § 5-6-34(d) where the father filed the appeal together with an appeal from the trial court's decision to terminate his parental rights. In the *Interest of T.A.M.*, 280 Ga. App. 494, 634 S.E.2d 456 (2006).

Transcript production appeal was untimely. — Defendant's appeal of the denial of his post-conviction motion requesting production of a trial transcript at government expense was dismissed as untimely. *Coles v. State*, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

Transcript of termination hearing not required. — Although a parent argued that the trial court erred in denying

the parent a copy of the termination hearing transcript to submit with the parent's application for discretionary review, there was no requirement under O.C.G.A. § 5-6-35(c) or Ga. Ct. App. R. 31 that the transcript be filed with the application. In *re D. R.*, 298 Ga. App. 774, 681 S.E.2d 218 (2009), overruled on other grounds, In *re A.C.*, 285 Ga. 829, 686 S.E.2d 635 (2009).

Action did not require application for discretionary appeal. — Tenants' action was not one that required an application for discretionary appeal when the action was not filed as a renewal of claims made in a *de novo* appeal to a superior court from a dispossession action brought in a magistrate court and when the superior court had denied the tenants' motion to add counterclaims before dismissing the appeal in the dispossession action *Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

Appeal from superior court's review of use and enforcement of investigative powers of the board of medical examiners required discretionary appeal procedures. *Rankin v. Composite State Bd. of Medical Exmrs.*, 220 Ga. App. 421, 469 S.E.2d 500 (1996).

Appeal from order awarding sanction. — An order imposing a monetary sanction for wilfully failing to attend a scheduled post-judgment deposition was in the nature of an award for frivolous litigation and required an application for discretionary appeal. *Bonnell v. Amtex, Inc.*, 217 Ga. App. 378, 457 S.E.2d 590 (1995).

An order imposing a sanction for unnecessarily expanding a proceeding was in the nature of an award for frivolous litigation within the purview of § 9-15-14(b) and, as such, was not directly appealable, but required an application for discretionary appeal. *Hill v. Doe*, 239 Ga. App. 869, 522 S.E.2d 471 (1999).

Appeal of finding of contempt.

Supreme court had no jurisdiction to consider a trial court's order holding a common law husband in contempt because the enumeration that addressed the contempt order was not predicated upon a proper and timely appeal from that order or from any other appealable order that

encompassed that subsequent ruling since the contempt order was not prior to or contemporaneous with that final judgment such that it can be enumerated in the case pursuant to O.C.G.A. § 5-6-34(d) but was a subsequent ruling that the husband was not entitled to enumerate; a separate appeal was not proper in the absence of compliance with the discretionary appeal procedures set forth in O.C.G.A. § 5-6-35(a)(2), no application seeking discretionary review of the contempt order had ever been filed, and the record did not contain any transcript of the contempt hearing. *Norman v. Ault*, 287 Ga. 324, 695 S.E.2d 633 (2010).

Appeal on issue of liquor license. — Supreme Court of Georgia holds that where the underlying subject matter of an appeal prevails over the relief sought when both the direct and discretionary appeal statutes are implicated, such appeals must be brought under the discretionary appeals statute, O.C.G.A. § 5-6-35; accordingly, the trial court's grant of a liquor license applicant's writ of mandamus petition against a county commission that had denied the applicant's request for a license should have been by such procedure. *Augusta-Richmond County v. Lee*, 277 Ga. 483, 592 S.E.2d 71 (2004).

Appeal from denial of liquor license. — Although the nightclub had a right pursuant to O.C.G.A. § 5-6-35 to seek a discretionary review of the trial court's judgment affirming an administrative agency's decision to deny its application for renewal of its liquor license, the nightclub did not have a right to directly appeal that judgment after the Supreme Court reviewed and rejected the nightclub's discretionary appeal, as the denial of the discretionary appeal was a ruling on the merits; thus, the nightclub was not entitled to have the Supreme Court review those same claims again. *Northwest Soc. & Civic Club, Inc. v. Franklin*, 276 Ga. 859, 583 S.E.2d 858 (2003).

Traffic appeals, etc.

Any appeal from a superior court review under § 40-13-28 of any lower court, except the probate court, shall be under subsection (a); however, an appeal from the superior court review under

§ 40-13-28 of a traffic case from the probate court shall be by direct appeal under § 5-6-34(a)(1). *Power v. State*, 231 Ga. App. 335, 499 S.E.2d 357 (1998).

Mandamus. — Even though appellant doctor sought review of a decision by appellee board of medical examiners by filing a mandamus action, and even though a judgment in a mandamus action was subject to direct appeal under O.C.G.A. § 5-6-34, the doctor was required to file an application to appeal pursuant to O.C.G.A. § 5-6-35 because the underlying subject matter of the doctor's appeal was covered by O.C.G.A. § 5-6-35. *Ferguson v. Composite State Bd. of Med. Exam'rs*, 275 Ga. 255, 564 S.E.2d 715 (2002).

If a request for mandamus relief attacks or defends the validity of an administrative ruling and seeks to prevent or promote the enforcement thereof, the trial court must necessarily "review" the administrative decision within the meaning of O.C.G.A. § 5-6-35(a)(1) before ruling on the request for mandamus relief. *Ferguson v. Composite State Bd. of Med. Exam'rs*, 275 Ga. 255, 564 S.E.2d 715 (2002).

Intermediate court properly transferred an application for discretionary review filed by a limited liability limited partnership (LLLP), seeking review of the denial of its request for a writ of mandamus, to the Georgia Supreme Court, as cases involving the grant or denial of mandamus are within the exclusive jurisdiction of the Georgia Supreme Court without regard to the underlying subject matter or the legal issues raised. As the case involved permitting requirements for landfills, it concerned a statutory scheme requiring a permit from the state for a land use that was regulated by the state, and the LLLP was entitled to a direct appeal from the denial of its mandamus action. *Mid-Georgia Env'tl. Mgmt. Group, L.L.L.P. v. Meriwether County*, 277 Ga. 670, 594 S.E.2d 344 (2004).

Laches. — Appeal by county board of education members of a judgment denying the members' request to reverse the governor's order removing the members from office under O.C.G.A. § 45-10-4 for violating O.C.G.A. § 45-10-3 was not dismissed due to the doctrine of laches; the members

were required by § 45-10-4 to proceed under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq., and no delay warranted the imposition of the doctrine of laches; the governor's order was signed on August 6, 2010, and the members filed their petition for judicial review on August 12, 2010. *Roberts v. Deal*, No. S11A1515, 2012 Ga. LEXIS 297 (Mar. 19, 2012).

2. Judgments Concerning Child Custody

Orders dealing with child custody are subject to discretionary appeal procedures. In re L.W., 216 Ga. App. 222, 453 S.E.2d 808 (1995).

Child custody no longer governed by this statute. — As a parent's petition to modify a visitation schedule was a "child custody case" for purposes of O.C.G.A. § 5-6-34(a)(11), and as the legislature intended to remove child custody cases from the operation of O.C.G.A. § 5-6-35(a)(2) when the legislature excised references to such cases from that statute, the parent was entitled to file a direct appeal from the trial court's final judgment on the petition. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Constitutional challenge to application procedure terminating parental rights raised for first time on appeal. — Appellate court could consider a constitutional challenge to O.C.G.A. § 5-6-35(a)(12), which required an application for appeal from an order terminating parental rights, for the first time on appeal because the statutory procedure at issue did not come into play until after an adverse decision in the trial court and a decision to take an appeal. In re A.C., 285 Ga. 829, 686 S.E.2d 635 (2009).

No due process violation by requiring application for appeal in parental rights termination. — Discretionary appeal process of O.C.G.A. § 5-6-35(a)(12) did not violate a mother's due process rights following the termination of her parental rights to her child. In re A.B., 311 Ga. App. 629, 716 S.E.2d 755 (2011).

Orders terminating parental rights are directly appealable. In re L.W., 216 Ga. App. 222, 453 S.E.2d 808 (1995).

Temporary order changing custody directly appealable. — Mother was permitted to appeal a temporary order changing custody of the parties' children to the father without complying with O.C.G.A. §§ 5-6-34(b) and 5-6-35 because § 5-6-34 provided that all modifications of child custody orders filed on or after January 1, 2008 were directly appealable and were no longer subject to the interlocutory appeal procedures. *Taylor v. Curl*, 298 Ga. App. 45, 679 S.E.2d 80 (2009).

Requirement of an application for appeal in parental rights termination cases did not violate equal protection. — O.C.G.A. § 5-6-35(a)(12), which required an application for appeal from an order terminating parental rights, did not violate a parent's equal protection rights by treating that parent differently from other parents whose custody was interrupted, because termination cases and custody interruption cases were not similar, and the classification created by § 5-6-35(a)(12) was reasonable and supported by the state's legitimate interest in not permitting a deprived child to languish in temporary care. *In re A.C.*, 285 Ga. 829, 686 S.E.2d 635 (2009).

Direct appeal on refusal to change custody. — One parent filed an application for discretionary review of a trial court's order, which the Supreme Court of Georgia granted under O.C.G.A. § 5-6-35(j) inasmuch as the parent had a right under O.C.G.A. § 5-6-34(a)(11) to appeal directly from a judgment or order in a child custody case that refused to change custody and that held the parent in contempt of a child custody judgment or order. Furthermore, that parent, acting pursuant to § 5-6-35(a)(8), filed a timely application seeking review of the denial of a motion to set aside an order requiring that parent to pay the other parent's attorney fees and reasonable expenses, which application the court granted. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Inapplicable to deprivation cases. — Because deprivation cases are neither child custody nor domestic relations cases within the purview of this section, a right of direct appeal lies from such orders. *Balkcom v. State*, 227 Ga. App. 327, 489

S.E.2d 129 (1997); *In re J.P.*, 267 Ga. 492, 480 S.E.2d 8 (1997), overruling *In re D.S.*, 212 Ga. App. 203, 441 S.E.2d 412 (1994); *In re M.D.S.*, 211 Ga. App. 706, 440 S.E.2d 95 (1994); *In re N.A.B.*, 196 Ga. App. 819, 397 S.E.2d 301 (1990); *In re M.A.V.*, 206 Ga. App. 299, 425 S.E.2d 377 (1992).

Appeal from juvenile court decision in deprivation proceeding.

Appeals from a deprivation proceeding do not involve child custody and therefore do not require an application to appeal. *In re J.P.*, 220 Ga. App. 895, 470 S.E.2d 706 (1996), *aff'd*, 267 Ga. 492, 480 S.E.2d 8 (1997).

Denial of custodial parent's motion to set aside attorney fees. — Trial court did not err when the court denied a custodial parent's motion to set aside an award of attorney fees because the court's underlying judgment was final and the trial court's award of attorney fees did not supplement, amend, alter, or modify an order and judgment which were the subjects of the pending discretionary application and notice of appeal. Thus, the supercedeas of the application and notice of appeal did not deprive the trial court of jurisdiction to enter the award of attorney fees. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

3. Divorce

Where the "underlying subject matter" of the case is divorce, etc.

Where the underlying subject matter was divorce, appellant was required to file an application for appeal as provided in this section; he could not avoid the discretionary review procedure by challenging the trial court's rulings via writ of prohibition. *Self v. Bayneum*, 265 Ga. 14, 453 S.E.2d 27 (1995).

Right to a direct appeal in child custody cases in O.C.G.A. § 5-6-34(a)(11) did not apply to a divorce decree in which child custody was an issue, even though the only relief sought on appeal pertained to the custody decision; the underlying subject matter was still the divorce action. Therefore, a parent was required to follow the discretionary appeal procedure of O.C.G.A. § 5-6-35, and the parent's direct appeal was dismissed. *Todd v. Todd*, 287 Ga. 250, 696 S.E.2d 323 (2010).

Mother's appeal of a judgment vacating an award of physical custody of a child to her and revising the decree to award physical custody of the child to the father was properly before the supreme court because the mother followed the required application procedures, and the timing of her notice of appeal did not deprive her of the appeal; because it was not a child custody case but a divorce case in which child custody was an issue; O.C.G.A. § 5-6-35(a)(2) required an application for discretionary appeal, and a direct appeal was not authorized by O.C.G.A. § 5-6-34(a)(11). *Todd v. Todd*, 287 Ga. 250, 696 S.E.2d 323 (2010).

Appeal from temporary alimony order. — A party seeking appellate review of an order awarding temporary alimony must comply with the interlocutory appeal procedure of § 5-6-34. *Bailey v. Bailey*, 266 Ga. 832, 471 S.E.2d 213 (1996).

Res judicata barred review where previous application was dismissed as untimely. — As a former spouse previously filed an application for discretionary review under O.C.G.A. § 5-6-35(a)(2), based on the spouses' claim that the spouse should have been credited as to the spouse's education expense obligation for the son's college tuition and expenses with the amount withdrawn by the son from a Uniform Transfer to Minor Account, and the application was dismissed as untimely filed, the former spouse was barred under res judicata from appealing that issue. *Norris v. Norris*, 281 Ga. 566, 642 S.E.2d 34 (2007).

Enforcement of divorce judgment.

Because an ex-wife and the children sought damages for a decedent's alleged failure to comply with an insurance provision in a divorce decree, and not a recovery of alimony or child support, the Supreme Court lacked jurisdiction to hear a discretionary appeal under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6) and the orders appealed from were subject to the discretionary appeal requirements of O.C.G.A. § 5-6-35(a)(2); therefore, the Court of Appeals correctly dismissed their direct appeal. *Walker v. Estate of Mays*, 279 Ga. 652, 619 S.E.2d 679 (2005).

Application for appeal timely filed. — In a divorce action, because a husband

sought a discretionary appeal within 30 days of the date the trial court made the parties' settlement agreement the judgment of the court, thereby terminating the litigation, the husband's application for a discretionary appeal was timely filed. *Underwood v. Underwood*, 282 Ga. 643, 651 S.E.2d 736 (2007).

Temporary alimony continues in effect until entry of remittitur. — Trial court erred in ruling that a husband was not obligated for temporary alimony amounts that had come due before the entry of remittitur in the trial court, but the court correctly ruled that as to child support, the temporary award remained in effect until the date the remittitur was entered because a temporary award continued in effect until the entry of the remittitur in the trial court, and it was from that date forward that any permanent award in a final judgment and decree of divorce had effect. *Nicol v. Nicol*, 240 Ga. 673, (1978), and cases following its reasoning on this issue are overruled. *Robinson v. Robinson*, 287 Ga. 842, 700 S.E.2d 548 (2010).

4. Garnishment

None due to time limitation expiration. — Where an owner of a brokerage service account that was garnished failed to timely appeal the garnishment judgment within 30 days, pursuant to the time limitations contained in O.C.G.A. § 5-6-35(a)(4), the assignee of the owner's rights had no right to appeal that judgment after such time had expired; the assignee had the same rights as the owner, and the owner's time had ran on such an appeal. *Lamb v. First Union Brokerage Servs.*, 263 Ga. App. 733, 589 S.E.2d 300 (2003).

Failure to obtain order permitting filing, etc.

In accord with *Easley, McCaleb and Stallings, Ltd. v. Gateway Mgt.* See *Maloy v. Ewing*, 226 Ga. App. 490, 486 S.E.2d 708 (1997).

5. Revocation of Probation

Pursuant to subsections (a)(5) and (d), appeals from orders revoking probation are discretionary and require that an application be filed with the clerk of the

appropriate court within 30 days of the date of the revocation order. *Todd v. State*, 236 Ga. App. 757, 513 S.E.2d 287 (1999).

Adjudication of guilt which revokes probationary status, etc.

In accord with *Dean v. State*. See *Zamora v. State*, 226 Ga. App. 105, 485 S.E.2d 214 (1997); *Freeman v. State*, 245 Ga. App. 333, 537 S.E.2d 763 (2000).

Availability of motion to set aside or for new trial. — Although the discretionary appeal procedures apply to an order revoking probation and all appeals from such orders must be by application, a discretionary appeal is not the exclusive method of seeking reconsideration or review of orders and judgments enumerated in subsection (a), thus barring any motion to set aside or for new trial. *Wells v. State*, 236 Ga. App. 607, 512 S.E.2d 711 (1999).

Appeal dismissed for lack of jurisdiction.

Defendant's filing of an application for discretionary appeal from a revocation of probation acted as a supersedeas to the same extent as a notice of appeal and deprived the trial court of jurisdiction to enter an amended revocation order. *Bryson v. State*, 228 Ga. App. 84, 491 S.E.2d 184 (1997).

The statute applied where the appellant challenged the sentence imposed upon the revocation of his probation, but did not challenge the revocation itself, since the underlying subject matter of the appeal was still the revocation of probation and, therefore, the appellant was required to apply for a discretionary appeal. *White v. State*, 233 Ga. App. 873, 505 S.E.2d 228 (1998).

Out-of-time appeal not authorized.

— Because defendant raised factors outside the plea hearing that allegedly affected the voluntariness of defendant's pleas, an out-of-time appeal under O.C.G.A. § 5-6-35(j) was not authorized because such issues could not be resolved by reference to facts contained in the record; rather, the issues could only be developed in the context of a post-plea hearing. *Clayton v. State*, 285 Ga. 404, 677 S.E.2d 126 (2009).

Appeals after unsuccessful participation in drug court program are discretionary. — Where defendant was sen-

tenced after unsuccessful participation in an O.C.G.A. § 16-13-2(a) drug court program, defendant's appeal was heard despite failing to comply with the discretionary appeal procedure of O.C.G.A. § 5-6-35(a)(5); in such cases, hearing appeals was discretionary, but that had not been clear prior to the instant case, so the appellate court heard defendant's case. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

Because the drug court program under O.C.G.A. § 16-13-2(a) is similar to the first offender statute of O.C.G.A. § 42-8-60 and because § 42-8-60 appeals are discretionary under O.C.G.A. § 5-6-35(a)(5), the discretionary appeal procedures of § 5-6-35(a)(5) must be followed when appealing after violation of the conditions of the drug court program. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

6. Damages Where Judgment Is \$10,000.00 or Less

Failure to comply with mandatory provision for discretionary appeal. —

When damages of less than \$10,000 were entered on a counterclaim against a limited liability company, the company's appeal of the counterclaim judgment had to be dismissed for failure to comply with the mandatory provision for discretionary appeal in O.C.G.A. § 5-6-35(a)(6). *Harpagon Co., LLC v. Davis*, 283 Ga. 410, 658 S.E.2d 633 (2008).

Amount of judgment is determinative.

Direct appeal should have been filed by application from the state court's judgment awarding plaintiff \$5,000 following defendant's appeal to the state court from the magistrate court's judgment entered in plaintiff's favor. *Salaam v. Nasheed*, 220 Ga. App. 43, 469 S.E.2d 245 (1996).

A direct appeal was not authorized from an order denying plaintiff's motion for new trial, motion to set aside the judgment, and motion to reopen default where the underlying judgment awarded to defendant on his counterclaim was less than \$10,000. *Khan v. Sanders*, 223 Ga. App. 576, 478 S.E.2d 615 (1996).

Where the plaintiff failed to follow the procedure for discretionary appeal in a

case where she was awarded \$1,500 in damages, her direct appeal was dismissed. *Jennings v. Moss*, 235 Ga. App. 357, 509 S.E.2d 655 (1998).

Appellate court properly dismissed an attorney's direct appeal in a case wherein the attorney sued a client for attorney fees because the judgment the attorney recovered was one for damages in an amount under \$10,000, and as such, it was subject to appeal as a matter of discretion under O.C.G.A. § 5-6-35(a)(6), rather than of right. The failure of the attorney to recover on the claims of prejudgment interest or attorney fees did not transform the judgment into a finding on liability adverse to the attorney so as to render appeal of the matter outside the ambit of § 5-6-35(a)(6). *Cooney v. Burnham*, 283 Ga. 134, 657 S.E.2d 239 (2008).

Total damages basis for jurisdiction. — In a case on an insurance contract, the total damages at stake in the case, not the damages remaining after set-offs, determined jurisdiction under this section; where total damages before set-offs were over \$10,000, this section did not apply and direct appeal was proper. *Eberhardt v. Georgia Farm Bureau Mut. Ins. Co.*, 223 Ga. App. 478, 477 S.E.2d 907 (1996).

Rent due less than \$2,500. — An application for discretionary appeal pursuant to O.C.G.A. § 5-6-35(a)(3) was not required because applications for discretionary appeal were required in appeals from cases involving distress or dispossessionary warrants in which the only issue to be resolved was the amount of rent due and such amount was \$2,500.00 or less; the tenant's notice of appeal showed that the tenant sought to raise issues other than the amount of rent due. *Smith v. R. James Props., Inc.*, 292 Ga. App. 317, 665 S.E.2d 19 (2008).

Effect of co-plaintiff's judgment. — Although the judgment for one plaintiff was less than \$10,000, the judgment was appealable without application, since no application was required for appeal of a zero award judgment to his co-plaintiff. *Smith v. Curtis*, 226 Ga. App. 470, 486 S.E.2d 699 (1997).

7. Appeals Under § 9-11-60

Denial of application for discretionary review.

As a hotel owner's application for discretionary appeal of the trial court's denial of the court's motion to set aside a default judgment and to open the default had been denied, the owner was estopped from seeking further judicial review of those orders. *PHF II Buckhead LLC v. Dinku*, No. A11A2033, 2012 Ga. App. LEXIS 325 (Mar. 22, 2012).

Denial of motion to set aside judgment.

Unless tied to a directly appealable order, an appeal from the denial of a motion to set aside a judgment under this subsection requires a timely application to the appellate court for permission to pursue a discretionary appeal. *Thierman v. Thierman*, 234 Ga. App. 716, 507 S.E.2d 489 (1998).

Denial of defendant's motion to set aside the judgment required an application for discretionary appeal. *Bonnell v. Amtex, Inc.*, 217 Ga. App. 378, 457 S.E.2d 590 (1995).

Plaintiffs' notice of direct appeal did not confer appellate jurisdiction on the court to consider the trial court's denial of their motion to set aside a judgment which incorporated an arbitration award in the absence of a proper and timely order granting permission to pursue a discretionary appeal. *Anderson v. GGS Hotel Holdings, Ga., Inc.*, 234 Ga. App. 284, 505 S.E.2d 572 (1998).

The court lacked jurisdiction to hear the caveator's appeal of the probate court's order denying the caveator's motion to set aside the court's previous orders granting letters of dismission to the executrix, where the caveator's direct appeal was untimely and the caveator's application to the appellate court for a discretionary appeal also was untimely. *Thierman v. Thierman*, 234 Ga. App. 716, 507 S.E.2d 489 (1998).

In an action in which an appellant sought review of the denial of a motion to vacate and set aside a consent order, the appellate court lacked jurisdiction over the appeal; the appellant did not file a timely application for a discretionary ap-

peal under O.C.G.A. § 5-6-35, as was required under O.C.G.A. § 5-6-35(a)(8) for orders under O.C.G.A. § 9-11-60(d) denying a motion to set aside a judgment. *Rogers v. Estate of Harris*, 276 Ga. App. 898, 625 S.E.2d 65 (2005).

Appeal from denial of motion for relief from foreign judgment based on the foreign state's lack of personal jurisdiction was subject to this section. *Okepkpe v. Commerce Funding Corp.*, 218 Ga. App. 705, 463 S.E.2d 23 (1995).

Appeal of an order denying appellants' motion to vacate a foreign judgment was dismissed because appellants never filed a motion to set aside the judgment under O.C.G.A. § 9-11-60(d), which was the proper method for attacking a foreign judgment filed under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of appellants' motions was an attempt to set aside a judgment, and the denial of appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the proper procedure to follow to appeal. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

Failure to appeal divorce decree. — Husband's application to vacate an arbitration award under O.C.G.A. § 9-9-13 should have been dismissed rather than denied since the trial court's divorce decree in which it approved the arbitration award was final on the date that it issued the decree even though the arbitration award had, in fact, not been issued on that date; thus, the husband should have filed an application for a discretionary appeal from the trial court's final judgment within 30 days of the entry of the judgment and decree under O.C.G.A. § 5-6-35(d) or filed a motion to set aside the judgment and decree under O.C.G.A. § 9-11-60. Since, pursuant to O.C.G.A. § 9-9-15 the order confirming the arbitration award became the judgment of the trial court on the date that the trial court issued its divorce decree, all matters in litigation in the action were final on that date, including those submitted for arbitration, and the later purported arbitra-

tion award was of no effect. *Ciraldo v. Ciraldo*, 280 Ga. 602, 631 S.E.2d 640 (2006).

8. Attorney's Fees or Expenses

When application not required, etc.

In accord with *Haggard v. Board of Regents*. See *Mitcham v. Blalock*, 268 Ga. 644, 491 S.E.2d 782 (1997).

Direct appeal from an award of attorney fees under § 9-15-14 was not properly before the Court of Appeals after the directly appealable judgment was dismissed. *Roberts v. Pearce*, 232 Ga. App. 417, 501 S.E.2d 555 (1998). See *Burns v. Howard*, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

When an attorney and law firm appealed an award to a hospital of attorney fees and expenses incurred in resisting a subpoena issued in a medical malpractice case, to which the hospital was not a party, by the attorney, the attorney's and law firm's petition for discretionary review was timely, under O.C.G.A. § 5-6-35(d), because: (1) the petition was filed within 30 days of the trial court's amended award of attorney fees and expenses; and (2) the appellate court's dismissal of the attorney's and law firm's attempt to appeal the original award by notice of appeal, which found the original award was interlocutory, was the law of the case. *Reeves v. Upson Reg'l Med. Ctr.*, No. A11A2194, 2012 Ga. App. LEXIS 311 (Mar. 21, 2012).

Because the main case was before the Court of Appeals of Georgia, Third Division on direct appeal, under O.C.G.A. § 5-6-35(j) the court granted an attorney's application for discretionary appeal of the denial by the trial court of the attorney's motion for attorney fees pursuant to O.C.G.A. § 9-15-14(a), (b). After considering the record under the appropriate standards as to each subsection, the court held that the trial court did not abuse its discretion and that the evidence supported its denial of the motion. *Kilgore v. Sheetz*, 268 Ga. App. 761, 603 S.E.2d 24 (2004).

Failure to follow requisite discretionary appeals procedures. — Employer's failure to follow the requisite discretionary appeals procedures of O.C.G.A.

§ 5-6-35 deprived the appellate court of jurisdiction to consider the claim that the trial court erred in granting the employee attorney fees on the employee's claim against the employer for past wages. *Capricorn Sys. v. Godavarthy*, 253 Ga. App. 840, 560 S.E.2d 730 (2002).

Lacking application, appeal dismissed, etc.

In accord with *Loveless v. Pickering*. See *Morris v. Morris*, 226 Ga. App. 799, 487 S.E.2d 528 (1997).

Challenge to award of attorney's fees denied. — Defendant's challenge of award of attorney's fees to plaintiff based on the frivolous nature of defendant's adverse possession defense to an ejectment action was not properly before the Court of Appeals since defendant's appeal was from the dismissal of his prior appeal rather than from the underlying claim. *Boveland v. YWCA*, 227 Ga. App. 241, 489 S.E.2d 35 (1997).

Construed with O.C.G.A. § 5-6-34(a). — Even though the amount of attorney fees awarded by a trial court was less than \$10,000, a petition for inspection and copying of records was not an action for damages necessitating a discretionary appeal under O.C.G.A. § 5-6-35(a)(6). *Motor Whse., Inc. v. Richard*, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

9. Zoning Cases

Application to Court of Appeals required. — Appeals from decisions in zoning cases require an application to the Court of Appeals for permission to pursue a discretionary appeal, pursuant to paragraph (a)(1) of this section. *City of Byron v. Betancourt*, 242 Ga. App. 71, 528 S.E.2d 841 (2000).

The court was without jurisdiction, etc.

In accord with *Pruitt v. Fulton County*. See *OS Adv. Co. v. Rubin*, 267 Ga. 723, 482 S.E.2d 295 (1997).

Denial of injunctive relief. — Appeal from denial of injunction filed to enforce a zoning ordinance was not a superior court review of an administrative decision; it was therefore directly appealable under § 5-6-34(a)(4), and did not fall under the

purview of paragraph (a)(1) of this section so as to require the grant of an application for discretionary appeal. *Harrell v. Little Pup Dev. & Constr., Inc.*, 269 Ga. 143, 498 S.E.2d 251 (1998).

Direct appeal was proper where zoning case did not involve superior court review of an administrative decision. *White v. Board of Comm'rs*, 252 Ga. App. 120, 555 S.E.2d 45 (2001).

Construction with O.C.G.A. § 5-6-34. — Underlying subject matter of a resident's suit seeking a writ of mandamus and other relief arising from the issuance of a building permit for the construction of a school building in the neighborhood concerned the review of an administrative zoning decision and, therefore, the appellate court had jurisdiction to address the merits only in the context of a discretionary appeal; while the trial court's order ruling against the resident was appealable under O.C.G.A. § 5-6-34(a), the resident was required to obtain permission to file the appeal, and could not circumvent the discretionary application requirements of O.C.G.A. § 5-6-35. *Ladzinske v. Allen*, 280 Ga. 264, 626 S.E.2d 83 (2006).

10. Criminal Cases

Habeas petition improperly granted. — Writ of habeas corpus granted to a prisoner was reversed because the prisoner presented the same issues raised in the habeas petition to the trial court and relief had been denied, and the prisoner's appeal of that decision was rejected by the appellate courts; the prisoner's claim was procedurally barred. *Thompson v. Stinson*, 279 Ga. 196, 611 S.E.2d 29 (2005).

Trial court may not grant extension for discretionary appeal. — Although extensions of time could be granted for applications for discretionary appeal, pursuant to O.C.G.A. § 5-6-39(a)(5), a trial court did not have the authority to grant an out-of-time discretionary appeal in a criminal case as a remedy for counsel's failure to timely file the application under O.C.G.A. § 5-6-35(d) absent a violation of appellant's constitutional rights. *Gable v. State*, 290 Ga. 81, 720 S.E.2d 170 (2011).

5-6-36. Filing of motion for new trial and motion for judgment notwithstanding verdict where appeal taken from judgment, ruling, or order.

Law reviews. — For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007).

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Construction with O.C.G.A. § 9-11-50. — While the failure to move for a directed verdict barred a party from contending on appeal that said party was entitled to a judgment as a matter of law because of insufficient evidence, such did not bar that party from claiming their entitlement to a new trial on that ground, as fairness dictated that a party who has failed to move for a directed verdict at trial should not be able to obtain a judgment as a matter of law on appeal based on the contention the evidence was insufficient to support the verdict. *Aldworth Co. v. England*, 281 Ga. 197, 637 S.E.2d 198 (2006).

Failure to renew motion for directed verdict. — Challenges to the sufficiency of the evidence may be considered on appeal pursuant to O.C.G.A. § 5-6-36(a); even though an owner and a driver failed to renew their motions for a directed verdict on the issues of agency and lost earnings at the close of all evidence, the appellate court considered the merits of the evidentiary challenges. *Pep*

Boys-Manny, Moe & Jack, Inc. v. Yahyapour, 279 Ga. App. 674, 632 S.E.2d 385 (2006).

Excessiveness of verdict. — Appellate court declined to set aside the amount of the verdict for pain and suffering and wrongful death where a juvenile in a child care institution was accidentally electrocuted because \$1,000,000 for pain and suffering and \$2,000,000 for wrongful death were not excessive as a matter of law. *Ga. Dep't of Human Res. v. Johnson*, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Cited in *Balkcom v. State*, 227 Ga. App. 327, 489 S.E.2d 129 (1997); *GLW Int'l Corp. v. Yao*, 243 Ga. App. 38, 532 S.E.2d 151 (2000); *ALEA London Ltd. v. Woodcock*, 286 Ga. App. 572, 649 S.E.2d 740 (2007); *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007); *Bldg. Materials Wholesale, Inc. v. Triad Drywall, LLC*, 287 Ga. App. 772, 653 S.E.2d 115 (2007); *Gill Plumbing Co. v. Jimenez*, 310 Ga. App. 863, 714 S.E.2d 342 (2011); *Gospel Tabernacle Deliverance Church, Inc. v. From the Heart Church Ministries, Inc.*, 312 Ga. App. 355, 718 S.E.2d 575 (2011).

RESEARCH REFERENCES

ALR. — Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

5-6-37. Filing and contents of notice of appeal; service of notice upon parties to appeal.

Law reviews. — For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004). For survey article on appellate practice and procedure,

see 59 Mercer L. Rev. 21 (2007). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010).

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General Consideration

Judgment of forfeiture. — Because an appealed judgment was a forfeiture, the court of appeals addressed the merits of the appeal. *Arreola-Soto v. State*, 314 Ga. App. 165, 723 S.E.2d 482 (2012).

Transmittal of portion of record. — An appellant may choose to have only a portion of a record transmitted to the Court of Appeals, but this does not relieve him from the obligation to demonstrate error by the record. *Jordan v. Johnson*, 223 Ga. App. 875, 479 S.E.2d 175 (1996).

Delay in filing of transcript is not necessarily cause for dismissal.

Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. *Fulton County Bd. of Tax Assessors v. Love*, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Erroneous filing with Supreme Court. — An application for discretionary appeal erroneously filed with the Supreme Court was not required to be dismissed as untimely, but could be transferred to the Court of Appeals. *Smith v. Department of Human Resources*, 226 Ga. App. 491, 487 S.E.2d 94 (1997).

Supersedeas not enforceable. — Issue of whether judgment debtor received adequate notice of sheriff's sale was not preserved for the appellate court's review, as the judgment debtor did not seek to set aside the supersedeas bond order or the sheriff's sale. *Wilson v. 72 Riverside Invs., LLC*, 277 Ga. App. 312, 626 S.E.2d 521 (2006).

Cited in *Barton v. Barton*, 216 Ga. App. 292, 454 S.E.2d 155 (1995); *Adams v. State*, 234 Ga. App. 696, 507 S.E.2d 538

(1998); *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674, 530 S.E.2d 800 (2000); *Holy Fellowship Church of God in Christ v. First Community Bank*, 242 Ga. App. 400, 530 S.E.2d 24 (2000); *NF Invs., Inc. v. Whitfield*, 245 Ga. App. 72, 537 S.E.2d 207 (2000); *Cain v. State*, 275 Ga. 784, 573 S.E.2d 46 (2002); *In re Estate of Dasher*, 259 Ga. App. 201, 575 S.E.2d 921 (2002); *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009); *Burnett v. State*, 309 Ga. App. 422, 710 S.E.2d 624 (2011).

Filing of Notice of Appeal

Burden is upon party desiring to take appeal to file timely notice of appeal.

Because a litigant's appeal was untimely filed, despite evidence of mistaken delivery beyond the litigant's control, the superior court properly held that the court lacked discretion to find otherwise as the burden to timely file an appeal could not be relieved by providential cause and excusable neglect; thus, the court did not err in dismissing the appeal. *Register v. Elliott*, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

Motion for out-of-time appeal properly denied. — The trial court properly denied the defendant's motion for an out-of-time appeal, as such failed to show any meritorious ground, and the defendant's failure to timely file an appeal did not result from the ineffective assistance of trial counsel, as it was apparent from the transcript of the plea hearing that the issues sought to be raised in the out-of-time appeal completely lacked merit. *Hicks v. State*, 281 Ga. 836, 642 S.E.2d 31 (2007).

Request to file out-of-time appeal construed as habeas motion. — Construing the defendant's request for an out-of-time appeal from a 1995 resentencing on various convictions as one seeking

habeas corpus relief, and in light of the language in O.C.G.A. § 9-14-43, the trial court's order denying the defendant relief on jurisdictional grounds was reversed, and the matter was remanded for the trial court to consider the defendant's motion as one for a writ of habeas corpus. *Anderson v. State*, 284 Ga. App. 776, 645 S.E.2d 362 (2007).

Content of Notice of Appeal

Notice of appeal must specify appealable judgment, etc.

In accord with *Ballew v. State*. See *Bish v. State*, 232 Ga. App. 121, 501 S.E.2d 283 (1998); *Zachery v. State*, 233 Ga. App. 519, 504 S.E.2d 466 (1998).

Evidence missing from notice of appeal.

O.C.G.A. § 5-6-37 is designed to allow appellate courts to determine if the record before them contains the same evidence that was before the trial court at the time it ruled. Since the discovery responses of the parties, which were filed before the motion for summary judgment, have been omitted based on the record designation in the notice of appeal and based on the absence of an affidavit and a deposition cited in the summary judgment documents, it is obvious that the party omitted material evidence from the record on appeal, and therefore it must be presumed that the superior court record properly supports the grant of summary judgment in favor of defendants. *Moulton v. Wood*, 265 Ga. App. 389, 593 S.E.2d 911 (2004).

When the notice of appeal did not specify that a transcript of evidence, etc.

In a suit by homeowners for breach of an exclusive listing contract, a statement in the notice of appeal that the "entire record" should be transmitted to the appellate court, was insufficient to ensure the transmittal of a trial transcript and did not meet the burden under O.C.G.A. § 5-6-37 to state whether or not any transcript of evidence and proceedings was to be transmitted as a part of the record on appeal. *West v. Austin*, 274 Ga. App. 729, 618 S.E.2d 662 (2005).

Sufficiency of notice. — An amended notice of appeal complied with the requirement of this section where an exam-

ination of the record clearly identified the judgment appealed from. In *re Burton*, 271 Ga. 491, 521 S.E.2d 568 (1999).

When it was apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors were sought to be asserted upon appeal, the appeal was not subject to dismissal and shall be considered in accordance therewith. *Carter v. Fayette County*, 287 Ga. App. 175, 651 S.E.2d 108 (2007).

Designation of wrong appellate court. — Although defendant's notice of appeal designated the wrong appellate court, that error provided no basis for dismissing the appeal. *Evans v. State*, 235 Ga. App. 877, 510 S.E.2d 619 (1999).

Denial of motion for reconsideration was not appealable order. — The first of two notices of appeals from an order denying a detainee habeas relief did not invoke the appellate court's jurisdiction as the denial of a motion for reconsideration of a final judgment was not subject to direct appeal. *Ferguson v. Freeman*, 282 Ga. 180, 646 S.E.2d 65 (2007).

Parties to Appeal

Only parties to proceeding below may be parties on appeal.

Notwithstanding a settlement agreement in which the decedent's wife released any interest in the decedent's estate, given that the decedent's mother was not a party in the probate court, despite publication of notice and service by the wife, the mother lacked standing to appeal the probate court's decision to award the wife a year's support. *Booker v. Booker*, 286 Ga. App. 6, 648 S.E.2d 445 (2007).

All parties below are parties on appeal.

Nonappealing trust beneficiaries who were parties to trial court orders at issue on appeal were properly designated as parties to the appeal. *Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 489 S.E.2d 310 (1997).

Parent's right to appeal delinquency adjudication. — As parties to their child's delinquency action pursuant to O.C.G.A. § 15-11-39(b), the child's par-

ents had the right to appeal the juvenile court's judgment and to participate in the appellate process. In the Interest of

J.L.B., 280 Ga. App. 556, 634 S.E.2d 514 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 67.

ALR. — Sufficiency of “designation” under Federal Appellate Procedure Rule 3(c)

of judgment or order appealed from in civil cases by notice of appeal not specifically designating such judgment or order, 141 ALR Fed 445.

5-6-38. Time of filing notice of appeal; cross appeal; record and transcript for cross appeal; division of costs where cross appeal filed; appeals in capital offense cases for which death penalty is sought.

Law reviews. — For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004).

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CROSS APPEALS

General Consideration

Requirements of section are jurisdictional, etc.

In accord with *Thompkins v. State*. See *Underwood v. Lanier Home Ctr., Inc.*, 239 Ga. App. 282, 521 S.E.2d 207 (1999).

Court had jurisdiction over appeal.

— When a defendant filed a notice of appeal within 30 days of the judgment, having previously filed a motion for a new trial after the verdict but before the defendant was sentenced, and later withdrew the motion for new trial, the appellate court had jurisdiction to consider the merits of the defendant's appeal. *Hann v.*

State, 292 Ga. App. 719, 665 S.E.2d 731 (2008).

Because the defendant filed a notice of appeal within 30 days after the trial court denied the defendant's motion for new trial, the defendant's appeal was properly before the court of appeals and would be considered on the motion's merits. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Cited in *Citizens & S. Trust Co. v. Hicks*, 216 Ga. App. 338, 454 S.E.2d 207 (1995); *Henderson v. State*, 265 Ga. 317, 454 S.E.2d 458 (1995); *Tranakos v. Miller*, 220 Ga. App. 829, 470 S.E.2d 440 (1996); *Goodman v. Lake Buckhorn Estates*

Homeowners Ass'n, 224 Ga. App. 765, 481 S.E.2d 882 (1997); *Carter v. Fayette County*, 228 Ga. App. 47, 491 S.E.2d 115 (1997); *Adams v. State*, 234 Ga. App. 696, 507 S.E.2d 538 (1998); *Wimberly v. State*, 235 Ga. App. 388, 508 S.E.2d 699 (1998); *Bodiford v. State*, 238 Ga. App. 531, 517 S.E.2d 356 (1999); *Merchant v. Mitchell*, 241 Ga. App. 173, 525 S.E.2d 710 (1999); *Brown v. E.I. du Pont de Nemours & Co.*, 240 Ga. App. 893, 525 S.E.2d 731 (1999); *Brasuell v. State*, 243 Ga. App. 176, 531 S.E.2d 732 (2000); *Cox v. State*, 242 Ga. App. 334, 528 S.E.2d 871 (2000); *NF Invs., Inc. v. Whitfield*, 245 Ga. App. 72, 537 S.E.2d 207 (2000); *Veasley v. State*, 272 Ga. App. 837, 537 S.E.2d 42 (2000); *Board of Comm'rs v. Guthrie*, 273 Ga. 1, 537 S.E.2d 329 (2000); *Johnson v. State*, 246 Ga. App. 239, 539 S.E.2d 914 (2000); *Coleman v. Grimes*, 250 Ga. App. 880, 553 S.E.2d 185 (2001); *Smith v. State*, 257 Ga. App. 468, 571 S.E.2d 446 (2002); *Gulledge v. State*, 276 Ga. 740, 583 S.E.2d 862 (2003); *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (2003); *Bailey v. McNealy*, 277 Ga. App. 848, 627 S.E.2d 893 (2006); *Green v. Benton*, No. CV 305-113, 2006 U.S. Dist. LEXIS 13296 (S.D. Ga. Mar. 13, 2006); *Kappelmeier v. HSBC USA, Inc.*, 280 Ga. App. 349, 634 S.E.2d 133 (2006); *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007); *McRae v. SSI Dev., LLC*, 283 Ga. 92, 656 S.E.2d 138 (2008); *In re Estate of Boss*, 293 Ga. App. 769, 668 S.E.2d 283 (2008); *Liu v. Boyd*, 294 Ga. App. 224, 668 S.E.2d 843 (2008); *Barnaby v. Scott*, 299 Ga. App. 691, 683 S.E.2d 333 (2009); *Jackson v. State*, 286 Ga. 407, 688 S.E.2d 351 (2010).

Appealable Judgments or Orders

Judgment entered on consent verdict or guilty plea.

Defendant's appeals did not qualify as direct appeals from the entry of defendant's guilty pleas because they were from a ruling on a motion filed 10 years after the entry of judgment and sentence and were filed pursuant to notices of appeal that referred to the denial of the motion to void judgment. *Orr v. State*, 276 Ga. 91, 575 S.E.2d 444 (2003).

Dismissal of motion for new trial, etc.

Dismissal or denial of a new trial due to failure to provide the transcript is, for purposes of subsection (a), an order "finally disposing" of the motion, triggering the 30 days for filing of an appeal. *Evans v. State*, 230 Ga. App. 728, 497 S.E.2d 248 (1998).

Judgment not final as to all parties.

Although a trial court made no factual determination concerning defendant's failure to pursue a direct appeal, a habeas court had previously determined that defendant knowingly and voluntarily withdrew the new trial motion against the advice of counsel and waived the right to a direct appeal; as a result, the trial court properly denied defendant's motion for an out-of-time appeal under O.C.G.A. § 5-6-38(a) and properly limited the record. *Simmons v. State*, 276 Ga. 525, 579 S.E.2d 735 (2003).

Dismissal of complaint against one of two defendants. — Because an insured could not use a voluntary dismissal of one of the defendants as the vehicle for appellate review of rulings entered by the trial court more than 30 days from the filing of the notice of appeal, and no other final appealable ruling existed in the record, the insured's appeal was dismissed based on the appellate court's lack of jurisdiction. *Waye v. Continental Special Risks, Inc.*, 289 Ga. App. 82, 656 S.E.2d 150 (2007), cert. denied, 2008 Ga. LEXIS 392 (Ga. 2008).

Jurisdiction

Trial court exceeded its authority.

— Where a trial court effectively granted defendant an 11-month extension of time under O.C.G.A. § 5-6-39(c) in which to file a notice of appeal, the appeal was dismissed because the trial court lacked authority under O.C.G.A. § 5-6-38(a) to do so. *Cody v. State*, 277 Ga. 553, 592 S.E.2d 419 (2004).

Timely filing of notice, delaying motion or grant of extension necessary.

Where an application for discretionary review was not filed, and a subsequent notice of direct appeal was filed untimely, there was no jurisdiction conferred on the court to hear the appeal. *Boney v. State*,

236 Ga. App. 179, 510 S.E.2d 892 (1999).

Proper, timely filing of notice of appeal, etc.

In accord with *Banks v. Green*. See *Brown v. Webb*, 224 Ga. App. 856, 482 S.E.2d 382 (1997).

When, in a dispossessory action, a trial court dismissed a tenant's counterclaim and designated the dismissal as a final judgment under O.C.G.A. § 9-11-54(b), the tenant had to appeal any adverse rulings in that order within 30 days of the entry of judgment, under O.C.G.A. § 5-6-38, and, by failing to so appeal that judgment, the tenant's right to review of those rulings was lost. *Lewis v. Carscallen*, 274 Ga. App. 711, 618 S.E.2d 618 (2005).

Appellate court without jurisdiction.

Because a judgment awarding a property owner damages was final, the residents' attempt to appeal that judgment two years later was untimely, and the Court of Appeals lacked jurisdiction to consider their arguments; although the residents asserted error in other rulings by the trial court, those orders apparently were entered after they filed their notice of appeal in the case, and the Court of Appeals could not consider them. *Paine v. Nations*, 301 Ga. App. 97, 686 S.E.2d 876 (2009).

Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order, and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court entered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Notice of cross-appeal properly filed. — In a tenant's action against the leasing agent of an apartment complex alleging that soot from an apartment heating system caused the tenant to suffer respiratory and lymph node problems, the agent's jurisdictional challenge to the tenant's cross-appeal from a trial court ruling that granted the agent's motion for a directed verdict on the tenant's claim for punitive damages was unsuccessful; within 15 days of being served with the tenant's notice of appeal, the tenant filed a notice of cross-appeal stating that the tenant was appealing from the grant of a directed verdict in favor of the agent on the punitive damages issue, and that was the tenant's sole claim of error on the cross-appeal. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Filing

1. In General

Second notice of appeal was a nullity where defendant had already filed a notice of appeal and the initial appeal was pending. *Elrod v. State*, 222 Ga. App. 704, 475 S.E.2d 710 (1996).

Notice of appeal of order denying motions for directed verdict and judgment notwithstanding the verdict was timely. — Commercial vehicle liability insurer's notice of appeal of an order denying the insurer's motion for directed verdict and judgment notwithstanding the verdict was timely under O.C.G.A. §§ 5-6-38 and 9-11-50(b) because the notice of appeal was filed within 30 days of the trial court's order on the insurer's motion for judgment notwithstanding the verdict, which the insurer filed within 30 days of the entry of the judgment. *Infinity Gen. Ins. Co. v. Litton*, 308 Ga. App. 497, 707 S.E.2d 885 (2011), cert. denied, No. S11C1110, 2011 Ga. LEXIS 580 (Ga. 2011).

Pro se filings. — Because all but three of a pro se defendant's notices of appeal were untimely, under O.C.G.A. § 5-6-38(a), the appellate court declined to consider them. *Owens v. State*, 258 Ga. App. 647, 575 S.E.2d 14 (2002).

Defendant was not responsible for defendant's failure to timely appeal since the

trial court failed to advise defendant of defendant's right to counsel for purposes of filing a motion to withdraw defendant's guilty plea or that defendant could appeal the denial of defendant's motion directly. *Murray v. State*, 265 Ga. App. 119, 592 S.E.2d 898 (2004).

Mother's challenge to deprivation order. — Because a mother's challenge to the unappealed February 11, 2004 deprivation order was brought on April 29, 2004, as part of a timely appeal from the April 21, 2004 disposition order entered in the same deprivation proceeding, motions filed by the Department of Children and Family Services requesting that the mother's appeals be dismissed were denied. In the Interest of S.P., 282 Ga. App. 82, 637 S.E.2d 802 (2006).

Transcript production appeal was untimely. — Defendant's appeal of the denial of his post-conviction motion requesting production of a trial transcript at government expense was dismissed as untimely. *Coles v. State*, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

Time of appeal in mandamus action. — Because a prisoner's early petition for judicial review of the denial of parole was treated as a petition for a writ of mandamus, and using the starting date from the second denial of parole, the prisoner's habeas petition was timely filed under 28 U.S.C. § 2244(d) in that the petition was filed within 10 days of the denial of mandamus under O.C.G.A. § 5-6-38 and within the one year period. *Day v. Hall*, 528 F.3d 1315 (11th Cir. 2008).

2. Running of Time for Filing

Judgment must be signed and filed for notice of appeal time to begin running. — O.C.G.A. § 5-6-31 plainly provides that the filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of the Appellate Practice Act, and as a result the 30-day limit under O.C.G.A. § 5-6-38(a) for filing a notice of appeal does not begin to run until a judgment, signed by the judge, is filed with the clerk;

to the extent that *Ross v. State*, 259 Ga. App. 246 (2003) holds otherwise, it is hereby overruled. *Rocha v. State*, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Where judgment is set aside and reentered, etc.

In accord with *Cambron v. Canal Ins. Co.* See *Fremichael v. Doe*, 221 Ga. App. 698, 472 S.E.2d 440 (1996).

Nunc pro tunc entry. — Under O.C.G.A. §§ 5-6-31 and 5-6-38(a), the 30-day time period for filing a notice of appeal did not begin to run until a judgment, signed by the judge, was filed with the clerk; thus, a defendant's appeal was timely, as the 30 days did not begin to run on the nunc pro tunc date, but on the date the signed judgment was filed. *Rocha v. State*, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

While a nunc pro tunc entry does not extend the statutory period for filing a notice of appeal, case law does not stand for the proposition that a nunc pro tunc entry can shorten the statutory period for filing a notice of appeal provided in O.C.G.A. § 5-6-38(a), which begins to run when judgment is entered in accordance with O.C.G.A. § 5-6-31. *Rocha v. State*, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Pro se appellant did not have time extension. — Court could not put patient, acting pro se, on a different standard from that of the physician represented by counsel, and where the patient submitted a letter to the court, and erroneously thought the patient had been given an extension of time to file a notice of appeal (as opposed to the hearing transcript), the court properly dismissed the patient's appeal, filed well after the 30 day deadline, as untimely. *Campbell v. McLarnon*, 265 Ga. App. 87, 593 S.E.2d 21 (2003).

Forfeiture order. — In a civil forfeiture proceeding, the state's motion to dismiss a claimant's appeal was denied since the claimant's notice of appeal was timely filed within 30 days following the entry of the order of distribution. *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009), cert. denied, No. S10C0024, 2010 Ga. LEXIS 128 (Ga. 2010).

3. Premature Filing

Appeal from judgment while case is pending, etc.

Premature filing of a notice of appeal from denial of a motion for a new trial was treated as effectively filed upon entry of the order denying the motion; overruling *Staton v. State*, 219 Ga. App. 316, 464 S.E.2d 888 (1995). *Livingston v. State*, 221 Ga. App. 563, 472 S.E.2d 317 (1996).

4. Late Filing

Notice filed 31 days after rendition of judgment is too late.

Where an order was entered on January 13 and a notice of appeal was filed on February 13, the notice of appeal was not timely as there was no proper extension of time. *Patel v. Georgia Power Co.*, 234 Ga. App. 141, 505 S.E.2d 787 (1998).

Effect of vacating order denying motion for new trial. — Although the case became ripe for appeal when the trial court denied the motion for new trial, an appeal was timely where the trial court vacated its order denying the motion for new trial. *Animashaun v. State*, 216 Ga. App. 104, 453 S.E.2d 126 (1995).

Grant of out-of-time appeals in criminal cases.

Where dismissal of a represented criminal defendant's appeal was appropriate and constitutionally permissible, because it was not timely filed by counsel, defendant would be entitled to make application for an out-of-time appeal. *Rowland v. State*, 264 Ga. 872, 452 S.E.2d 756 (1995).

Defendant's motion for an out of time appeal was the functional equivalent of a timely notice of appeal and was treated as such where the document: (1) was filed within the 30-day time limit of O.C.G.A. § 5-6-38 for filing a notice of appeal since it was filed within 30 days of the filing date of the order which denied defendant's motion for a new trial; (2) was served upon the state; and (3) undeniably evinced defendant's intention to seek appellate review of the denial of the motion for a new trial and gave notice to the state of that intent. *Cain v. State*, 275 Ga. 784, 573 S.E.2d 46 (2002).

An out-of-time appeal is occasionally appropriate where, due to ineffective as-

sistance of counsel, no appeal has been taken. But an appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record. *Smith v. State*, 268 Ga. App. 748, 602 S.E.2d 839 (2004).

While the Court of Appeals of Georgia initially stated that the defendant's appeal was subject to dismissal based on a failure to timely file a notice of appeal from the trial court's order denying a out-of-time motion for a new trial and for other relief, as required by O.C.G.A. § 5-6-38, the Appeals Court proceeded to address the defendant's claims in the interest of finality and to avert a claim of ineffective assistance of counsel because it granted the defendant's application for a discretionary appeal. *Segura v. State*, 280 Ga. App. 685, 634 S.E.2d 858 (2006).

Dismissal for late filing. — Defendant's pro se motion appealing the denial of his motion for out-of-time appeal and/or extraordinary motion for new trial was properly dismissed for untimeliness when he waited until three months after his conviction to appeal, his appeal was not properly designated, and failed to enumerate any error relating to the trial. *Davis v. State*, 233 Ga. App. 825, 505 S.E.2d 801 (1998).

Judgment complained of by parents was a trial court's finding that the parents' children were deprived pursuant to O.C.G.A. § 15-11-2(8)(A), and not a later order ruling that the case was closed; the parents' notice of appeal filed more than three months after the order finding deprivation was untimely, and the appeal was dismissed. *In the Interest of I.S.*, 265 Ga. App. 759, 595 S.E.2d 528 (2004).

Because a lessee's notice of appeal was filed nearly a year after a superior court's order was entered, it was untimely and thus dismissed. *Masters v. Clark*, 269 Ga. App. 537, 604 S.E.2d 556 (2004), appeal dismissed, *Clark v. Masters*, 297 Ga. App. 794, 678 S.E.2d 538 (2009).

Because a litigant's appeal was untimely filed, despite evidence of mistaken delivery beyond the litigant's control, the superior court properly held that the court lacked discretion to find otherwise; thus, the court did not err in dismissing the appeal. *Register v. Elliott*, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

Motion to dismiss an appeal on grounds that the appealing party failed to timely appeal an order granting summary judgment pursuant to O.C.G.A. § 5-6-38(a) was granted; moreover, the appeal was not taken from the final judgment entered in the case. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

In a breach of contract action, a corporation's appeal of a default judgment entered against the corporation was dismissed as untimely as the notice of appeal was to have been filed within 30 days of the entry of the default judgment, but the corporation did not file an appeal until seven months later. *GMC Group, Inc. v. Harsco Corp.*, 293 Ga. App. 707, 667 S.E.2d 916 (2008).

Time for filing expired. — It was not an abuse of discretion to deny defendant's motion for a new trial, requested to facilitate defendant's efforts to become a naturalized citizen, because the trial court considered that defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims the defendant's guilty plea was not voluntary were of no avail as defendant failed to move to withdraw the plea or to appeal and the times for doing so had expired. *Elias v. State*, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

Failure of state to file cross-appeal. — Where an inmate appealed a habeas court's original order granting the inmate a new appeal in the inmate's criminal case, and the state failed to file a cross-appeal from that original order, the state was not allowed to pursue an appeal of the habeas court's later order on remand granting the inmate a new trial; the merits of the issue were reached and resolved in the habeas court's earlier final order, and the state's attempt to challenge those merits in the instant appeal was untimely. *Stewart v. Milliken*, 277 Ga. 659, 593 S.E.2d 344 (2004).

Ineffective assistance of counsel. — Out-of-time appeal was appropriate where, as the result of ineffective assistance of counsel, a timely direct appeal was not taken, and the movant for an

out-of-time appeal needed to establish a good and sufficient reason entitling the movant to such an appeal; defendant's motion for an out-of-time appeal was properly denied where defendant claimed that defendant's trial counsel did not provide defendant with a copy of the plea hearing transcript, but also stated that defendant first tried to obtain a copy of the transcript nearly eight months after defendant's guilty plea and conviction, well after the time for a direct appeal had passed. *Pearson v. State*, 265 Ga. App. 574, 594 S.E.2d 769 (2004).

Motion for out-of-time appeal denied. — Denial of defendant's motion for an out-of-time appeal from defendant's conviction and sentence after the entry of a guilty plea was not an abuse of discretion. Defendant's claims that defendant received ineffective assistance of counsel did not show that defense counsel's conduct frustrated defendant's right to appeal, defendant did not have an unqualified right to appeal after the entry of a guilty plea, defendant failed to show how the trial court deviated from the negotiated plea as the record showed that the sentence matched the recommendation, and defendant was not entitled to expand the record in an attempt to meet defendant's burden for an out-of-time appeal. *Jackson v. State*, 266 Ga. App. 461, 597 S.E.2d 535 (2004).

The trial court properly denied a defendant's motion for an out-of-time direct appeal after the defendant plead guilty. The defendant had not shown that the issues raised could be decided upon facts appearing in the record and did not contend that ineffectiveness of counsel frustrated the defendant's right to file a timely direct appeal; rather, the defendant asserted that counsel failed to investigate, failed to object to the sufficiency of the accusation, failed to personally negotiate the plea agreement, and failed to file a material document. *Smith v. State*, 291 Ga. App. 459, 662 S.E.2d 253 (2008).

A defendant's pro se motion for an out-of-time direct appeal was properly denied because the defendant's claims were meritless. A plea petition and a transcript showed that the defendant's guilty plea was knowing, intelligent, and voluntary,

and by not objecting to the failure to be placed under oath at the guilty plea hearing, the defendant waived the requirement of an oath. *Sweeting v. State*, 291 Ga. App. 693, 662 S.E.2d 785 (2008).

Trial court properly denied a defendant's motion for an out-of-time appeal. Based on a plea acknowledgment form, counsel's certification, and the plea colloquy, there was no merit to the defendant's claims that the defendant had not been informed of the nature of the charges and that the trial court failed to establish a factual basis for the defendant's guilty plea. *Colbert v. State*, 284 Ga. 81, 663 S.E.2d 158 (2008).

Trial court properly denied a defendant's motion for an out-of-time appeal. The defendant clearly stated the defendant's desire to discontinue the services of trial counsel and accept punishment; in addition, although counsel informed the defendant of the appeal deadline after giving the defendant notice of counsel's intent to withdraw, the defendant waited 18 years before seeking an out-of-time appeal. *Duncan v. State*, 297 Ga. App. 499, 677 S.E.2d 691 (2009).

Effect of attorney's incompetency in filing. — Although defendant alleged in defendant's motion for an out-of-time appeal that defendant asked trial counsel to file an appeal from defendant's criminal convictions and defendant's trial counsel performed inadequately by failing to do so, the trial court did not err in denying defendant's motion, as defendant was also required to allege, but did not allege, the issues that defendant would have raised if the out-of-time appeal were granted and that those issues could be resolved by reference to facts in the record. *White v. State*, 261 Ga. App. 866, 584 S.E.2d 5 (2003).

Motion in arrest of judgment did not toll appeal time. — Defendant's motion in arrest of judgment did not toll the time for filing an appeal of defendant's conviction under O.C.G.A. § 5-6-38(a), as it was filed after the term of the trial court in which defendant was convicted and was untimely under O.C.G.A. § 17-9-61(b); the fact that the trial court was late in sending defendant written notice of its ruling on the motion in arrest of judgment

did not deny defendant the right to appeal the conviction, which was lost years earlier when the motion in arrest of judgment was untimely filed. *Smith v. State*, 263 Ga. App. 414, 587 S.E.2d 787 (2003).

Court reporter delayed filing transcript. — Appeal was timely as the notice of appeal was filed within 30 days after entry of an appealable judgment as required by O.C.G.A. § 5-6-38(a); although the court reporter inexplicably did not file the transcript with the court until two years later, defendant did not cause an unreasonable and inexcusable delay in filing the appeal. *Johnson v. State*, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

State prisoner should have been aware of alleged civil rights claims against a court reporter and clerk prior to the dismissal of untimely habeas petition because the prisoner had one year and 30 days from the time the conviction became final under O.C.G.A. § 5-6-38(a) and 28 U.S.C. § 2244(d)(1) to file a habeas petition and the prisoner should have known sometime within the three years until the court received the record that the prisoner's right to file a habeas petition had been compromised. Further, the prisoner waited more than two years after the court received the record to file the civil rights claims. *Salas v. Pierce*, No. 08-11129, 2008 U.S. App. LEXIS 22075 (11th Cir. Oct. 23, 2008) (Unpublished).

Automatic Extension of Time for Filing

2. What Motions Extend Time for Filing

Motion to set aside judgment.

A motion to set aside, even though based on a nonamendable defect and/or lack of jurisdiction, cannot extend the time for filing a notice of appeal. *MMT Enters., Inc. v. Cullars*, 218 Ga. App. 559, 462 S.E.2d 771 (1995) (overruling *Law Offices of Johnson & Robinson v. Fortson*, 175 Ga. App. 706, 334 S.E.2d 33 (1985); *Mathis v. Hegwood*, 169 Ga. App. 547, 314 S.E.2d 122 (1984); and *Littlejohn v. Tower Assoc.*, 163 Ga. App. 37, 293 S.E.2d 33 (1982), annotated in bound volume).

Motions for modification of sentence and to correct a void and illegal

sentence did not toll or extend the time for appeal. *Syms v. State*, 232 Ga. App. 724, 502 S.E.2d 741 (1998).

3. When Time for Filing Not Extended

Motion for new trial.

Motion for new trial that was not filed within 30 days as required by § 5-5-40 was void, had no effect and did not toll the time for filing a notice of appeal under this section. *Peters v. State*, 237 Ga. App. 625, 516 S.E.2d 331 (1999).

O.C.G.A. § 5-6-38 requires a trial court order granting, denying, or otherwise finally disposing of a party's motion for new trial in order to extend the time for filing a notice of appeal more than 30 days after the entry of judgment; a party's voluntary withdrawal of its motion for new trial, standing alone, is not the statutorily required court order finally disposing of the motion for new trial. *Heard v. State*, 274 Ga. 196, 552 S.E.2d 818 (2001).

Second application for appeal untimely. — Because plaintiff filed a second application for discretionary appeal on June 28, 2010, after withdrawing the plaintiff's motion for new trial, the motion was untimely as the motion was filed 61 days after the entry of the judgment on April 28, 2010; pursuant to O.C.G.A. § 5-6-38 the trial court had to dispose of the motion for new trial to extend the time for filing a notice of appeal. *Cooper v. Spotts*, 309 Ga. App. 361, 710 S.E.2d 159 (2011).

Construction of "holidays." — Because the plain language of O.C.G.A. § 5-6-38(a) and O.C.G.A. § 1-3-1(a) make no provisions for extending the filing time for notices of appeal to compensate for county declared holidays and O.C.G.A. § 1-4-2 limits religious holidays to Sundays, Good Friday did not constitute a holiday for purposes of extending the filing date. In *re Estate of Dasher*, 259 Ga. App. 201, 575 S.E.2d 921 (2002).

Cross Appeals

Cross appeal not required. — A ruling that becomes material to an enumeration of error urged by an appellant may be considered by the appellate court without the necessity of a cross-appeal. *Dunn*

v. Five Star Dodge-Jeep-Eagle-Mazda, Inc., 245 Ga. App. 378, 537 S.E.2d 782 (2000).

Because the trial court had entered an order denying several of the appellee's motions, including summary judgment motions, after the appellants filed their notice of appeal from a contempt order, the appellate court had jurisdiction to consider the appellee's cross-appeal pursuant to O.C.G.A. § 5-6-38(a); the appellee's cross-appeal was preceded by the trial court's denial order, and therefore, it could be considered on appeal. *Rhone v. Bolden*, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

Cross-appeal to appealable order.

The independent appeal authorized by this Code section was not the direct appeal to a discovery ruling attempted by a co-defendant in a breach of contract action, but was an application for discretionary review of a timely certified interlocutory discovery order, and failure to properly perfect this appeal resulted in dismissal of the appeal. *Reliance Ins. Co. v. Cobb County*, 235 Ga. App. 685, 510 S.E.2d 129 (1998).

Cross appeal from nonfinal judgment permissible, etc.

A co-defendant in a breach of contract action was an "appellee" within the meaning of this Code section, and was entitled to file a notice of cross-appeal within 15 days from service of the notice of appeal of a pre-final judgment discovery ruling by the other co-defendant. *Reliance Ins. Co. v. Cobb County*, 235 Ga. App. 685, 510 S.E.2d 129 (1998).

Cross appeal may concern motion to dismiss while main appeal concerns judgment dismissing party.

Because challengers who opposed a decision of the Coastal Marshlands Protection Committee granting a permit to a developer failed to comply with O.C.G.A. § 50-13-19(b), the trial court lacked jurisdiction to consider their untimely petition; nevertheless, because the committee and the developer filed timely petitions for review in the trial court, and then appealed to the court of appeals, the challengers' appeals were properly before the court of appeals as cross-appeals filed pursuant to O.C.G.A. § 5-6-38(a). *Coastal*

Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast, 286 Ga. App. 518, 649 S.E.2d 619 (2007), *aff'd*, 284 Ga. 736, 670 S.E.2d 429 (2008).

Cross-appeal to a cross-appeal is not contemplated by O.C.G.A. § 5-6-38(a). *Jones v. White*, 311 Ga. App. 822, 717 S.E.2d 322 (2011).

Notice held untimely.

When a habeas corpus petitioner cross-appealed the trial court's decision after the warden appealed it, the petitioner's cross-appeal was timely because it was filed within the 15 days allowed by O.C.G.A. § 5-6-38(a) plus the 3-day extension provided in O.C.G.A. § 9-11-6(e), as the warden's notice of appeal was mailed to the petitioner. *Head v. Thomason*, 276 Ga. 434, 578 S.E.2d 426, *cert. denied*, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

Cross appeal permitted after inter-

locutory appeal granted. — Because the Court of Appeals of Georgia granted an application for interlocutory appeal to the Department of Transportation in a slip and fall case, a city's cross-appeal was properly before the court. *Ga. DOT v. Strickland*, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Cross-appeal of claims not ruled upon. — Prisoner's ineffective-assistance-of-counsel claim under 28 U.S.C. § 2254 was improperly found procedurally barred because it was not firmly established under O.C.G.A. § 9-14-52 or O.C.G.A. § 5-6-38 and was not a regularly followed state practice for a prisoner to cross appeal claims upon which a state habeas court did not rule when the prisoner was successful on the prisoner's other state habeas claim. *Mancill v. Hall*, 545 F.3d 935 (11th Cir. 2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 69.

ALR. — Effect of escape by, or fugitive

status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief — State cases, 105 ALR5th 529.

5-6-39. Extensions of time for filing notice of appeal, notice of cross appeal, transcript of evidence, designation of record and other similar motions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TIMELINESS OF APPLICATION

GRANTS OF EXTENSIONS

1. NOTICE OF APPEAL
2. TRANSCRIPTS

General Consideration

Grounds for out of time appeal. — Motion for out of time appeal was properly denied where appellant alleged only that his attorney's inadequate performance was the reason why no timely appeal was filed and appellant failed to set forth the questions he would raise in an out of time appeal and that the questions could be

resolved by facts in the record. *Wheeler v. State*, 269 Ga. 547, 499 S.E.2d 629 (1998).

Because a direct appeal cannot be taken from a guilty plea on the ground of ineffective assistance of counsel unless that issue was developed through a post-plea hearing, it cannot be said that defendant's right of appeal was frustrated; simply put, defendant had no right of appeal and defendant's remedy lay in a habeas corpus

proceeding. *Rice v. State*, 278 Ga. 707, 606 S.E.2d 261 (2004).

Burden is on party desiring to take appeal.

Because a litigant's appeal was untimely filed, despite evidence of mistaken delivery beyond the litigant's control the superior court properly held that the court lacked discretion to find otherwise, as the burden to timely file an appeal could not be relieved by providential cause and excusable neglect; thus, the court did not err in dismissing the appeal. *Register v. Elliott*, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

Failure to get extension.

Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. *Dye v. U.S. Bank Nat'l Ass'n*, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Extending time for filing application for discretionary appeal. — Although extensions of time could be granted for applications for discretionary appeal, pursuant to O.C.G.A. § 5-6-39(a)(5), a trial court did not have the authority to grant an out-of-time discretionary appeal in a criminal case as a remedy for counsel's failure to timely file the application under O.C.G.A. § 5-6-35(d) absent a violation of appellant's constitutional rights. *Gable v. State*, 290 Ga. 81, 720 S.E.2d 170 (2011).

Second extension not authorized.

Paragraph (a)(1) gives courts authority to grant an extension of time to file a notice of appeal but this authority is limited by subsection (c) which provides that only one extension shall be granted for filing a notice of appeal and the extension shall not exceed the 30 days allowed for initial filing. *Legare v. State*, 269 Ga. 468, 499 S.E.2d 640 (1998).

Cited in *Hameed v. Hall*, 234 Ga. App. 890, 508 S.E.2d 680 (1998); *Durden v. Griffin*, 270 Ga. 293, 509 S.E.2d 54 (1998); *Bass v. Mercer*, 240 Ga. App. 545, 524 S.E.2d 260 (1999); *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674,

530 S.E.2d 800 (2000); *In re Estate of Dasher*, 259 Ga. App. 201, 575 S.E.2d 921 (2002); *Smith v. State*, 263 Ga. App. 414, 587 S.E.2d 787 (2003); *Pistacchio v. Frasso*, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Timeliness of Application

Failure to apply for extension before expiration of period for filing.

Since a construction company bringing an appeal of a jury verdict in favor of homeowners never sought an extension of time to file the transcript from the post-trial hearing on its motions for new trial and judgment notwithstanding the verdict, nor communicated with the court reporter during the nine-month period after the hearing, the record did not support the trial court's finding that the delay in filing that transcript caused by the construction company was excusable and the trial court's denial of the homeowners' motion to dismiss the appeal was error; the record showed that the construction company's actions delayed a just disposition of the case by delaying the docketing of the appeal and hearing of the case by the appellate court, and, consequently, the homeowners were forced to wait for a final disposition on the construction company's appeal of the verdict against it. *Coptic Constr. Co. v. Rolle*, 279 Ga. App. 454, 631 S.E.2d 475 (2006).

When an insurer's request for an extension of time to file transcripts in support of the insurer's appeal pursuant to O.C.G.A. § 5-6-39(a)(3) and (d) was not made until months after the initial filing period had expired, the motion was untimely; a trial court order granting the request was accordingly nugatory and void. *ACCC Ins. Co. v. Pizza Hut of Am., Inc.*, No. A11A1905, 2012 Ga. App. LEXIS 127 (Feb. 10, 2012).

Delay is attributable to appellant.

Evidence supported the trial court's order that defendant was not entitled to an out-of-time appeal, as defendant's own conduct, and not any error by defendant's trial attorney, was the reason for the lack of a timely appeal; because the appeal was untimely, the appellate court lacked jurisdiction to hear the same, warranting dis-

missal. *Edwards v. State*, 263 Ga. App. 106, 587 S.E.2d 258 (2003).

Ineffectiveness of counsel. — An out-of-time appeal is not authorized in every criminal case which involves a failure by counsel to comply with applicable procedures; such an appeal is not authorized if the loss of the right to appeal is not attributable to ineffective assistance of counsel but to the fact that the defendant himself slept on his rights. *Porter v. State*, 271 Ga. 498, 521 S.E.2d 566 (1999).

Grants of Extensions

1. Notice of Appeal

Computation of maximum extension allowable, etc.

In accord with *Rockdale County v. Water Rights Comm., Inc.* See *Dillard v. State*, 223 Ga. App. 405, 477 S.E.2d 674 (1996); *Grovnor v. Board of Regents*, 231 Ga. App. 120, 497 S.E.2d 652 (1998).

Indefinite extensions of time not authorized. — A consent judgment that was timely entered within 30 days of the appellant's motion for j.n.o.v., or new trial, but prior to the denial of the appellant's motion to set aside, would have been effective to grant the appellant a 30-day extension from the date on which it was entered, but it was not effective to extend the filing date for a notice of appeal after the date of a future ruling, viz., the denial of the appellant's motion to set aside. *MMT Enters., Inc. v. Cullars*, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

11-month extension of time. — Where a trial court effectively granted defendant an 11-month extension of time under O.C.G.A. § 5-6-39(c) in which to file a notice of appeal, the appeal was dismissed because the trial court lacked authority under O.C.G.A. § 5-6-38(a) to do so. *Cody v. State*, 277 Ga. 553, 592 S.E.2d 419 (2004).

Filing during unauthorized second extension.

Trial court was permitted to deny defendant's second request for an extension of time to file defendant's notice of appeal because statutory law allowed only one extension of time to be granted for filing a notice of appeal; thus, defendant's request for an out-of-time appeal after defendant

did not timely file defendant's notice of appeal was properly denied as it was defendant's own conduct which caused defendant to fail to timely file the notice of appeal in spite of the fact defendant knew both about the right to appeal and the right to obtain appointed counsel. *DeLoach v. State*, 257 Ga. App. 503, 571 S.E.2d 496 (2002).

Denial of extension request proper. — Trial court did not abuse its discretion in denying a condominium unit owner's (CUO) motion for a 90-day extension of time to file a notice of appeal in an action initiated by a neighboring condominium unit owner which was resolved in the neighboring owner's favor, as the CUO failed to refer to anything that would have constituted good cause for the extension, and there was no authority to grant an extension for longer than 30 days. *Schroder v. Murphy*, 282 Ga. App. 701, 639 S.E.2d 485 (2006), cert. denied, 2007 Ga. LEXIS 220 (Ga. 2007).

2. Transcripts

Burden is on appellant to request extension, etc.

Even though the initial delay in filing the transcript of the trial may not have been attributable to the minor, that did not excuse the filing delay in the absence of a proper request by the minor for an extension of time as required under O.C.G.A. § 5-6-39. In re C.F., 255 Ga. App. 93, 564 S.E.2d 524 (2002).

Delay in filing of transcript is not necessarily cause for dismissal. — Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused its discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. *Fulton County Bd. of Tax Assessors v. Love*, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Delay must have been unreasonable and inexcusable.

Trial court did not abuse its discretion in granting a dismissal of the plaintiff's appeal, pursuant to O.C.G.A. § 5-6-42, because the plaintiff failed to file a transcript for the plaintiff's appeal for more

than 17 months after the plaintiff filed the notice of appeal, the plaintiff never sought an extension of time under O.C.G.A. § 5-6-39, and the court held that the plaintiff's action was unreasonable, inexcusable, and caused by the plaintiff's own conduct; there was no requirement that a hearing be held on the motion to dismiss, pursuant to O.C.G.A. § 5-6-48(c), as the plaintiff was only entitled to an opportunity to be heard, which the plaintiff received. *Lemmons v. Newton*, 269 Ga. App. 880, 605 S.E.2d 626 (2004).

Effect of failure to timely file transcript. — Trial court did not abuse the court's discretion by dismissing a security corporation's appeal of a civil judgment against the corporation as a result of having failed to have filed a transcript within 30 days as required by O.C.G.A. § 5-6-42. Since no transcript existed, the appellate court was unable to determine whether the security corporation had rebutted the presumption that the filing of the transcript 49 days after the 30-day statutory deadline for filing transcripts was unreasonable and no extension was requested. *Pioneer Sec. & Investigations, Inc. v. Hyatt Corp.*, 295 Ga. App. 261, 671 S.E.2d 266 (2008).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48, that the appellant's delay in filing a transcript was unreasonable and inexcusable, and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, and at the hearing more than a year later, the appellant offered no evidence as to efforts taken by

the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. *Lavalle v. Jarrett*, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Trial court did not abuse the court's discretion in dismissing parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parents delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed their notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. *Bush v. Reed*, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion in finding that a mother's failure to timely pursue the filing of the transcript from the mother's parental rights termination hearing or seek an extension of time for almost one year was unreasonable and inexcusable and in dismissing the appeal under O.C.G.A. § 5-6-48(a). In the *Interest of T.H.*, 311 Ga. App. 641, 716 S.E.2d 724 (2011).

5-6-40. Enumeration of errors.

Law reviews. — For annual survey article discussing developments in criminal law, see 52 *Mercer L. Rev.* 167 (2000). For article, "May It Please the Court:"

Tips on Effective Appellate Advocacy from Start to Finish," see 16 (No. 1) *Ga. St. B.J.* 28 (2010).

JUDICIAL DECISIONS

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WHAT MAY BE ENUMERATED AS ERROR CONTENT AND FORM OF ENUMERATION

1. IN GENERAL

FILING OF ENUMERATION

General Consideration

Review of assertions of error.

Where an appellant asserts more than one error within a single enumeration, the appellate court in its discretion may elect to review none, or one or more, of the errors asserted within the single enumeration. *Hall v. State*, 235 Ga. App. 44, 508 S.E.2d 703 (1998).

The provision of Ga. Const., Art. VI, Sec. I, Par. IV that enables a court to take action to protect the efficacy of its judgment from a party's actions that endanger that judgment is not authority for an appellate court to protect an appellate adjudication from further appellate review by declining to reach the merits of an allegation of error sufficiently set forth pursuant to the Appellate Practice Act. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Failure to enumerate argument. — When the defendants failed to enumerate an argument on appeal, the appellate court would not consider the appeal. *Smith v. Saulsbury*, 286 Ga. App. 322, 649 S.E.2d 344 (2007).

Cited in *Evans v. DOT*, 226 Ga. App. 74, 485 S.E.2d 243 (1997); *Green v. State*, 226 Ga. App. 467, 486 S.E.2d 691 (1997); *Griffin v. State*, 228 Ga. App. 200, 491 S.E.2d 437 (1997); *Wozniuk v. Kitchin*, 229 Ga. App. 359, 494 S.E.2d 247 (1997); *Oliver v. State*, 232 Ga. App. 816, 503 S.E.2d 28 (1998); *Gibson v. State*, 233 Ga. App. 838, 505 S.E.2d 63 (1998); *Carl v. State*, 234 Ga. App. 61, 506 S.E.2d 207 (1998); *Felix v. State*, 234 Ga. App. 509, 507 S.E.2d 172 (1998); *Cantrell v. Northeast Ga. Medical Ctr.*, 235 Ga. App. 365, 508 S.E.2d 716 (1998); *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1 (1999); *Krieger v. Walton County Bd. of Comm'rs*, 241 Ga. App. 373, 525 S.E.2d 147 (1999); *Dole v. State*, 256 Ga. App. 146, 567 S.E.2d 756 (2002); *Walker v. State*, 285 Ga. App. 529, 646 S.E.2d 734 (2007); *Levy v. Reiner*, 290 Ga. App. 471, 659 S.E.2d 848 (2008); *Johnson v. State*, 290 Ga. App. 255, 659

S.E.2d 638 (2008); *Thomas v. State*, 291 Ga. App. 795, 662 S.E.2d 849 (2008); *Ray v. State*, 292 Ga. App. 575, 665 S.E.2d 345 (2008); *Bee v. State*, 294 Ga. App. 199, 670 S.E.2d 114 (2008); *Biederbeck v. Marbut*, 294 Ga. App. 799, 670 S.E.2d 483 (2008); *Collins v. State*, 300 Ga. App. 657, 686 S.E.2d 305 (2009); *Willis v. Willis*, 288 Ga. 577, 707 S.E.2d 344 (2010); *Futch v. State*, No. A11A2339, 2012 Ga. App. LEXIS 181 (Feb. 22, 2012).

What May Be Enumerated As Error

Setting forth erroneous ruling required. — An error of law has as its basis a specific ruling made by the trial court. In order for an appellate court to review a trial court ruling for legal error, a party must set forth in the enumeration of errors the allegedly erroneous ruling. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Setting forth arguments not required. — Because the arguments supporting a position concerning a legal ruling are not themselves legal rulings, they do not have to be enunciated in the enumeration of errors in order to merit appellate consideration. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Denial of motion to suppress. — Remand was required where defendants adequately set out in their enumeration of errors that they sought appellate review of the trial court's denial of their motion to suppress and the Court of Appeals did not address all the arguments raised by defendants in support of their enumerated error. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Content and Form of Enumeration

1. In General

Each enumeration may contain only one error.

Where the defendant asserts several errors in one enumeration, the court will address only one asserted error, especially where the defendant raises new grounds for some of his objections for the first time

on appeal. *Rocha v. State*, 234 Ga. App. 48, 506 S.E.2d 192 (1998).

Error sufficiently “set out separately.” — In order to take into account the duty imposed by § 5-6-48(f), where the enumeration of errors filed in the appellate court identifies the trial court ruling asserted to be error, the error relied upon is sufficiently “set out separately” to require the appellate court to shoulder its constitutional responsibility to be a court of review. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Pro se litigants. — Enumerations of error that were not in compliance with appellate rules would be considered in deference to the appellant’s pro se status. *Bennett v. Moody*, 225 Ga. App. 95, 483 S.E.2d 350 (1997).

Effect of several assertions of error in single enumeration, etc.

In accord with *West v. Nodvin*. See *Reid v. State*, 237 Ga. App. 690, 515 S.E.2d 201 (1999).

Where several assertions of error are contained within a single enumeration, the court may elect to review any one or more of them, and treat the remaining assertions as abandoned. *Mays v. Farah U.S.A., Inc.*, 236 Ga. App. 1, 510 S.E.2d 868 (1999).

In accord with *Robinson v. State*. See *Wingfield v. State*, 229 Ga. App. 75, 493 S.E.2d 235 (1997).

In the exercise of its discretion, the appellate court may elect to review any one or more of several assertions of error

contained within a single enumeration, and treat the remaining assertions therein as abandoned. *Phillips v. State*, 236 Ga. App. 744, 512 S.E.2d 32 (1999).

Multiple assertions of errors in single enumeration were not reviewed. See *White v. State*, 221 Ga. App. 860, 473 S.E.2d 539 (1996); *In re D.A.D.*, 224 Ga. App. 527, 481 S.E.2d 262 (1997); *Duggan v. State*, 225 Ga. App. 291, 483 S.E.2d 373 (1997); *Stubbs v. Harmon*, 226 Ga. App. 631, 487 S.E.2d 91 (1997).

Appellate brief not sufficient to raise error. — Arguments raised in the appellate brief are not made issues on appeal unless they are properly enumerated as error; thus, a food vendor’s argument in an appeal in a personal injury action that a certain jury charge should have been given was not properly preserved for review where the issue was raised in the vendor’s brief but was not enumerated as error. *Imperial Foods Supply, Inc. v. Purvis*, 260 Ga. App. 614, 580 S.E.2d 342 (2003).

Filing of Enumeration

Failure to file enumeration of errors, etc.

Failure to file an enumeration of errors requires dismissal of an appeal, and arguments raised in an appellate brief are not made issues on appeal unless they are properly enumerated as error. *Miles v. Emmons*, 234 Ga. App. 487, 507 S.E.2d 762 (1998).

5-6-41. Reporting, preparation, and disposition of transcript; correction of omissions or misstatements; preparation of transcript from recollections; filing of disallowed papers; filing of stipulations in lieu of transcript; reporting at party’s expense.

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REPORTING OF VOIR DIRE

CONTENT OF TRANSCRIPT

INCORRECT OR INCOMPLETE TRANSCRIPTS

STIPULATED TRANSCRIPTS

EXPENSES OF RECORDATION AND TRANSCRIPTION
APPLICATION**General Consideration**

Award of attorney fees. — Trial court's award of attorney fees to a corporation was upheld as the sheriff challenging the award failed to file a transcript, and the appellate court had to assume that the trial court was authorized to award the fees. *Barrett v. Marathon Inv. Corp.*, 268 Ga. App. 196, 601 S.E.2d 516 (2004).

Where defendant claimed that the jury was not sworn, defendant's remedy was to have the record corrected by following the provisions of subsection (f). *Grant v. State*, 237 Ga. App. 892, 515 S.E.2d 872 (1999).

Right to transcription.

While any party in a civil case may, as a matter of right, have a case reported at his own expense, it is not incumbent upon the trial judge to arrange for the official reporter to take down the evidence, and where the plaintiff declined to have the hearing transcribed through a court reporter, he could not later complain of the lack of a reporter. *Hixson v. Hickson*, 236 Ga. App. 894, 512 S.E.2d 648 (1999).

No transcript was either ordered or made for a trial. — Where there is no direct proof of prejudice or bias on the part of a jury, an appellate court can set aside the verdict as excessive only when the amount, considered in connection with all the facts in evidence at trial, shakes the moral senses, i.e., the verdict must carry its death warrant on the verdict's face; however, such issues must be determined from the trial transcript, and where no transcript was either ordered or made for a trial in which a jury entered a judgment against a mortgage company, and the mortgage company made no attempt to have the trial court make a transcript or a reconstructed transcript of the proceedings approved by the trial judge, the appellate court assumed that the judgment was correct and supported by the evidence. *Wells Fargo Home Mortg., Inc. v. Cook*, 267 Ga. App. 368, 599 S.E.2d 319 (2004).

It is the duty of appellant to have

transcript prepared, if it is needed, etc.

Appellate court presumed that a trial court's judgment granting a writ of possession was correct as the appellant failed to file a transcript of the proceedings and apparently did not attempt to reconstruct the transcript on appeal. *Fisher v. One Stop Mtg.*, 258 Ga. App. 479, 574 S.E.2d 605 (2002).

Delay in filing of transcript is not necessarily cause for dismissal. — Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused its discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. *Fulton County Bd. of Tax Assessors v. Love*, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Transcript or stipulation of record prerequisite to consideration of errors.

It is the appellant's obligation to provide the record substantiating his claim, and in its absence, the appellate court must affirm as to that issue. *State v. Dukes*, 234 Ga. App. 343, 507 S.E.2d 147 (1998).

Where plaintiff, in appealing a personal injury verdict, challenges the sufficiency of the evidence as her only enumeration of error on appeal, it is necessary that she include a transcript or recreation of the proceedings. *Moss v. Flav-O-Rich, Inc.*, 231 Ga. App. 288, 498 S.E.2d 361 (1998).

Omission from record on appeal of necessary transcript requires affirmance, etc.

In accord with *Brown v. Frachiseur*, 247 Ga. 463, 277 S.E.2d 16 (1981). See *Deen v. United Dominion Realty Trust*, 218 Ga. App. 443, 462 S.E.2d 384 (1995); *Tidwell v. White*, 220 Ga. App. 415, 469 S.E.2d 258 (1996); *Watson/Winter Joint Venture v. Milledge*, 224 Ga. App. 395, 480 S.E.2d 389 (1997); *McKinney v. Alexander Properties Group, Inc.*, 228 Ga. App. 77, 491 S.E.2d 131 (1997).

Defendant's claim, that the test results from a blood test were improperly admit-

ted in a criminal trial because the state failed to establish by a preponderance of the evidence that the blood tested was actually defendant's blood, lacked merit, as defendant failed to have a transcript created or attached to the appeal of a pretrial hearing on the motion in limine addressing that issue, and pursuant to O.C.G.A. § 5-6-41(g), the appellate court presumed the trial was conducted in a regular and proper manner. *Verlangieri v. State*, 273 Ga. App. 585, 615 S.E.2d 633 (2005).

Corrected transcripts. — A supplemental transcript submitted to the court some months after a hearing on a motion to suppress was permissible, where the court reporter certified that corrections were required as a result of a proofing error in transcription. *State v. Sneddon*, 235 Ga. App. 739, 510 S.E.2d 566 (1998).

Uncertified transcript. — In an appeal from a will contest, the propounder waived the argument that a superior court erred in relying on an uncertified transcript of a probate court hearing; an objection to the lack of certification was not raised in the superior court, and the propounder did not contend that the transcript contained any mistakes. *Land v. Burkhalter*, 283 Ga. 54, 656 S.E.2d 834 (2008).

In an appeal from a will contest, the propounder's argument that a proper foundation was not laid for the tape from which a transcript of the probate court hearing was prepared was waived by the propounder's failure to raise that objection in the superior court. *Land v. Burkhalter*, 283 Ga. 54, 656 S.E.2d 834 (2008).

It is duty of party asserting error to show it by the record.

Where defendant did not amend or supplement the trial court record in order to reflect the necessary facts pursuant to O.C.G.A. § 5-6-41(f), and where the parties did not stipulate to facts pursuant to O.C.G.A. § 5-6-41(i), it was found that defendant did not carry the burden of showing by the record that there were facts necessary to prove defendant's claim under Batson of racial and gender discrimination in the jury; the trial court record on that issue only consisted of

colloquy between counsel and the court, which was not competent evidence of the facts and was not a proper record upon which to establish a prima facie case of discrimination. *Bowden v. State*, 261 Ga. App. 422, 582 S.E.2d 564 (2003).

Absent transcript, court must assume evidence authorized judgment.

In the absence of either a transcript of lower court proceedings or an agreed statement of the events at trial, the appellate court must presume the trial judge ruled correctly on all issues presented and that the evidence was sufficient to support the judgment. *Hixson v. Hickson*, 236 Ga. App. 894, 512 S.E.2d 648 (1999).

In the absence of a trial transcript, the appellate court must assume as a matter of law that the evidence adduced at the hearing supported the trial court's findings, and thus, it could not consider the pro se defendant's assertion of the general grounds or his contention that the trial court failed to furnish him with the accusation and a list of witnesses. *Dunn v. State*, 234 Ga. App. 623, 507 S.E.2d 170 (1998).

Where plaintiff law firm secured a default judgment against defendant client and the client argued that the firm failed to provide competent evidence of the reasonableness of the fees that the firm charged the client, but the client failed to provide transcripts of the hearings which the trial court held regarding the reasonableness of the fees or a statement of facts made pursuant to O.C.G.A. § 5-6-41(g), the appellate court, in accordance with the presumption in favor of the regularity of court proceedings, was constrained to presume that the trial court's findings were supported by sufficient competent evidence. *Spewell v. Thomas & Hutson*, 260 Ga. App. 312, 581 S.E.2d 322 (2003).

Document never admitted into evidence not part of appellate record.

Because the closing arguments in defendant's child molestation trial were not transcribed, defendant had the burden of having the record completed in the trial court under the provisions of O.C.G.A. § 5-6-41(f) in order to raise an argument on appeal regarding the prosecutor's closing argument; since defendant failed to provide the necessary record to the appel-

late court, defendant's claim of error was not reviewable. *Jackson v. State*, 256 Ga. App. 829, 570 S.E.2d 40 (2002).

Failure to properly supplement record.

Because defendant's motion for a continuance was not made a part of the record in the court below, defendant failed to preserve any error in that regard for appellate review; defendant took no action on the record to renew the objection to the timing of the retrial or to make a record of the trial court's ruling, and failed to implement any of the mechanisms provided in O.C.G.A. § 5-6-41 for supplementing the record on appeal. *Anderson v. State*, 276 Ga. App. 216, 622 S.E.2d 898 (2005).

To the extent that a defendant's claim of ineffective assistance of counsel during the defendant's trial for felony murder and other offenses pertained to events that were not reflected in the record, an affidavit by defendant's trial counsel asserting that trial counsel should have made certain objections that were not made did not serve to supplement the record under O.C.G.A. § 5-6-41(f), and the affidavit's factual contentions, therefore, presented no issue for review on the defendant's appeal from the defendant's convictions and the denial of the defendant's motion for a new trial. *White v. State*, 281 Ga. 276, 637 S.E.2d 645 (2006).

Where trial judge has no independent recollection of trial. — A criminal defendant's attempts to prepare and file a unilateral account of the proceedings below did not meet the requirements of this section, where the trial court had no independent recollection of the defendant's battery trial, and no transcript was available. *Dunn v. State*, 234 Ga. App. 623, 507 S.E.2d 170 (1998).

Cited in *Haygood v. State*, 221 Ga. App. 477, 471 S.E.2d 552 (1996); *Keegan v. State*, 221 Ga. App. 487, 472 S.E.2d 107 (1996); *Womack v. State*, 223 Ga. App. 82, 476 S.E.2d 767 (1996); *Hinely v. Hinely*, 232 Ga. App. 211, 501 S.E.2d 20 (1998); *Shelnutt v. State*, 234 Ga. App. 655, 506 S.E.2d 643 (1998); *Reid v. Royal Creek Apts. Ltd. Partnership*, 239 Ga. App. 536, 521 S.E.2d 210 (1999); *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674, 530 S.E.2d 800 (2000); *Keller v. State*,

242 Ga. App. 150, 529 S.E.2d 167 (2000); *Baker v. State*, 247 Ga. App. 25, 543 S.E.2d 70 (2000); *Taylor v. Young*, 253 Ga. App. 585, 560 S.E.2d 40 (2002); *Strickland v. State*, 257 Ga. App. 304, 570 S.E.2d 713 (2002); *State v. Huckleba*, 258 Ga. App. 627, 574 S.E.2d 856 (2002); *In re Estate of Battle*, 263 Ga. App. 73, 587 S.E.2d 140 (2003); *Harden v. Young*, 268 Ga. App. 619, 606 S.E.2d 6 (2004); *Moss v. State*, 278 Ga. App. 362, 629 S.E.2d 5 (2006); *In re Otuonye*, 279 Ga. App. 468, 631 S.E.2d 500 (2006); *Monterey Cmty. Council v. DeKalb County Planning Comm'n*, 281 Ga. App. 873, 637 S.E.2d 488 (2006); *Johnson v. State*, 283 Ga. App. 524, 642 S.E.2d 170 (2007); *Thornton v. State*, 288 Ga. App. 60, 653 S.E.2d 361 (2007); *Andrus v. Andrus*, 290 Ga. App. 394, 659 S.E.2d 793 (2008); *Smith v. State*, 294 Ga. App. 692, 670 S.E.2d 191 (2008); *In the Interest of O.M.J.*, 297 Ga. App. 20, 676 S.E.2d 421 (2009); *Scott v. State*, 302 Ga. App. 111, 690 S.E.2d 242 (2010); *Michel v. Michel*, 286 Ga. 892, 692 S.E.2d 381 (2010); *Bryant v. State*, 309 Ga. App. 649, 710 S.E.2d 854 (2011); *Fulton County Bd. of Tax Assessors v. Fast Evictions, LLC*, 314 Ga. App. 178, 723 S.E.2d 461 (2012).

Felony Cases

Defendant failed to show prejudice.

— A defendant failed to demonstrate that the loss of two videotapes had harmed the defendant or precluded the appellate court from reviewing any of the issues raised on appeal with regard to the defendant's convictions for multiple offenses relating to the sexual molestation and exploitation of two minors. Significantly, although the videotapes were missing, the parties had stipulated to the contents of the tapes at the bench trial and to the proffered testimony of the minor victims. *Mitchell v. State*, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

Misdemeanor Cases

Claim to a free transcript. — In misdemeanor cases, it is within the trial court's discretion to require the reporting and transcribing of the evidence and proceedings by a court reporter, but two fac-

tors need to be considered on the record in evaluating an indigent defendant's claim to a free transcript: (1) the transcript's value in connection with the defendant's trial or appeal; and (2) the accessibility of other means that would fulfill the same functions as a transcript. Failure to make that evaluation on the record is not a proper exercise of a trial court's discretion. *Stanley v. State*, 267 Ga. App. 379, 599 S.E.2d 331 (2004).

Defendant in misdemeanor case is not denied transcript absent demand.

In criminal misdemeanor proceedings, the trial court did not err in accepting defendant's waiver of takedown; because defendant did not elect to have the proceedings taken down, whether the proceedings were reported was a matter within the trial court's discretion under O.C.G.A. § 5-6-41(b), and defendant failed to use the remedy provided under O.C.G.A. § 5-6-41(g), which provided a means of using the parties' recollection to reconstruct the proceedings. *Johnson v. State*, 280 Ga. App. 882, 635 S.E.2d 267 (2006).

Trial court did not err by failing to order transcription of a defendant's misdemeanor proceeding without ascertaining the defendant's indigence status or obtaining a waiver. Under O.C.G.A. § 5-6-41(b), the defendant had no right to a transcript in a misdemeanor case, and neither the defendant nor defense counsel requested transcription at defendant's own expense under § 5-6-41(j). *Bagley v. State*, 298 Ga. App. 513, 680 S.E.2d 565 (2009).

Trial judge's decision not to prepare narrative not subject to review.

— With regard to a defendant's attempt to appeal the sufficiency of the evidence with regard to the defendant's convictions for theft of services, a misdemeanor, and two counts of obstruction of a police officer, because the parties could not agree on a narrative, the trial judge's decision that no narrative would be created was final and not subject to review. *Williams v. State*, 287 Ga. App. 851, 652 S.E.2d 803 (2007).

Reporting of Voir Dire

Unrecorded voir dire. — Where voir dire is not recorded, the complaining

party has the duty of complying with procedure for reconstructing the record. *Denny v. State*, 226 Ga. App. 432, 486 S.E.2d 417 (1997).

Defendant's contention that possible error occurred during voir dire or that his counsel may have been ineffective and that, because of the lack of a record, he would never know if there was error was not a sufficient basis to require a new trial. *Primas v. State*, 231 Ga. App. 861, 501 S.E.2d 28 (1998).

Although defendant asserted that because voir dire was not transcribed, it was impossible to determine whether any errors occurred therein, so the judgment should have been reversed or the case should have been remanded to the trial court pursuant to O.C.G.A. § 5-6-41(f), the appellate court found that the general unspecified hope of reversible error during voir dire did not win a new trial on the ground that a record should have been made so as to accommodate a search for error now buried in unrecorded history. *Bynum v. State*, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a change of venue because although the court reporter transcribed the motion for change of venue and the trial court's ruling, the actual questions and answers of the prospective jurors were not reported, and defense counsel made no motion at that time to include the answers in the record or to have the answers reconstructed for the record; since voir dire was not transcribed, it was assumed that the jurors who were not excused for cause did not have such fixed opinions that the jurors could not be impartial judges of the defendant's guilt. *Walden v. State*, 289 Ga. 845, 717 S.E.2d 159 (2011).

Content of Transcript

Transmittal of portion of record. — An appellant may choose to have only a portion of a record transmitted to the Court of Appeals, but this does not relieve him from the obligation to demonstrate error by the record. *Jordan v. Johnson*, 223 Ga. App. 875, 479 S.E.2d 175 (1996).

Inclusion in transcript of all proceedings which may be questioned on appeal.

Father failed to support his contentions that the trial court erred in awarding child support payments to the mother because he failed to designate sufficient portions of the record for the appellate court to review as required by O.C.G.A. § 5-6-41. *Kennedy v. Kennedy*, 309 Ga. App. 590, 711 S.E.2d 103 (2011).

Transcript record failed to include continuance request. — Because an appellant failed to include in the transcript record appellant's request for a continuance, as well as nothing regarding the nature of this request or the parameters of the trial court's denial of this request, the appellate court refused to hold that the trial court erred in declining to grant a continuance. *Shamsai v. Coordinated Props., Inc.*, 259 Ga. App. 438, 576 S.E.2d 901 (2003).

Incorrect or Incomplete Transcripts

Purpose of subsection (f).

Subsection (f) is not an instrument for supplying fatal deficiencies after the fact. *Nobles v. Prevost*, 221 Ga. App. 594, 472 S.E.2d 134 (1996).

Where transcript or record is incomplete, etc.

See *Whitt v. State*, 215 Ga. App. 704, 452 S.E.2d 125 (1994); *Forehand v. State*, 267 Ga. 254, 477 S.E.2d 560 (1996); *Ney v. State*, 227 Ga. App. 496, 489 S.E.2d 509 (1997); *Floyd v. State*, 227 Ga. App. 873, 490 S.E.2d 542 (1997); *Pope v. State*, 228 Ga. App. 897, 494 S.E.2d 345 (1998); *Harris v. State*, 230 Ga. App. 403, 496 S.E.2d 277 (1998); *Eason v. State*, 249 Ga. App. 738, 549 S.E.2d 532 (2001).

Defendant's allegation that the state committed prosecutorial misconduct in the form of improper comments it made during closing argument could not be reviewed as the incomplete transcript did not allow the reviewing court to review the contention; thus, reversal of defendant's conviction could not be ordered since defendant had the obligation of providing a sufficient transcript for appellate review. *McFarlin v. State*, 259 Ga. App. 838, 578 S.E.2d 546 (2003).

Burden is on an appealing defendant to

ensure that the record includes the issue upon which the defendant seeks review as well as the lower court's ruling on such issue, and where the proof necessary for determination of the issues on appeal is omitted from the record, the appellate court must assume that the judgment below was correct and affirm; thus, where the record in a case of child molestation and other crimes did not reveal a final ruling denying defendant's motion to admit evidence of the victims' prior molestation and defendant alleged that the ruling was given in an unrecorded bench conference, the issue of whether the trial court erred in allegedly excluding such evidence could not be determined on appeal and the trial court's action was presumed correct. *Pollard v. State*, 260 Ga. App. 540, 580 S.E.2d 337 (2003).

Quality of a tape-recording of a termination-of-parental-rights hearing was so poor that the court reporter could not understand much of what was said; as it was the mother's burden to provide the transcript of the hearing, because the transcript was inadequate to address a claim of error, the appellate court assumed the trial court's ruling was correct. *In the Interest of C.T.M.*, 278 Ga. App. 297, 628 S.E.2d 713 (2006).

Defendant did not complain of a missing transcript or refer to a hearing in a motion for new trial, thus, even though the state was not able to locate a transcript of the hearing, there was no basis to remand the case. *Butts v. State*, 279 Ga. App. 28, 630 S.E.2d 182 (2006).

Judgment in favor of the defendants in a medical malpractice suit was upheld on appeal because the plaintiffs failed to provide an adequate record on appeal so as to allow the appellate court to address the alleged errors committed by the trial court; as a result, the trial court's rulings were presumed correct. *Steele v. Atlanta Maternal-Fetal Med., P.C.*, 283 Ga. App. 274, 641 S.E.2d 257 (2007).

Domestic violence defendant's complaint that the grand jury was tainted by an outside influence that prejudiced the grand jury by giving the grand jurors a general presentation on domestic violence could not be reviewed because the defendant failed to include the transcript of the

hearing on the defendant's motion to quash the indictment. *Pierce v. State*, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

Trial court did not err in ruling that the transcript of the hearing on a manufacturer's motion for summary judgment accurately portrayed what had occurred at the hearing because a driver had the burden to seek corrective action under O.C.G.A. § 5-6-41(f). *Udoinyion v. Michelin N. Am., Inc.*, 313 Ga. App. 248, 721 S.E.2d 190 (2011).

In a criminal trial, the defendants failed in the defendants' claim that a recording of a witness interview was erroneously admitted due to a failure to lay a foundation for the admission of prior consistent or inconsistent statements because, inter alia, the defendants did not meet the defendants' burden, under O.C.G.A. § 5-6-41, to complete the record to show what part of the interview was played for the jury. *White v. State*, No. A11A2323; No. A11A2324, 2012 Ga. App. LEXIS 312 (Mar. 21, 2012).

Failure to provide transcript. — Judgment ordering a writ of possession and past rent due was presumed to be correct because a tenant did not file a transcript of the hearing or attempt to recreate the record. *Hughley v. Habra*, 277 Ga. App. 138, 625 S.E.2d 531 (2006).

Because no transcript of a lower court's proceedings was submitted on appeal and no attempt was made to recreate the record as provided for in O.C.G.A. § 5-6-41(g), (i), a tenant's appeal could not be considered. *Creagh v. Federal Nat'l Mortg. Assoc.*, 277 Ga. App. 614, 627 S.E.2d 813 (2006).

Without a hearing transcript, the appeals court was unable to review an LLC's claim that the trial court erred by failing to give it an opportunity to amend a defective answer, and whether it was error to deny the LLC an evidentiary hearing on the amount of damages owed, as the court could not verify the LLC's claim that the trial court did not admit evidence on the issue of damages. *Sterling, Winchester & Long, LLC v. Loyd*, 280 Ga. App. 416, 634 S.E.2d 188 (2006).

When a wife in a divorce case claimed that the trial court had improperly heard the case without a jury, but the wife had failed to provide a transcript under O.C.G.A. § 5-6-41, the court would presume that the trial court faithfully and lawfully performed its duties and would conclude that the case was properly heard without a jury. *Fine v. Fine*, 281 Ga. 850, 642 S.E.2d 698 (2007).

In the absence of a transcript in a divorce case, the court had to assume that the evidence adduced during the bench trial was sufficient to support the trial court's evidentiary rulings regarding the wife's enumerations of error. *Fine v. Fine*, 281 Ga. 850, 642 S.E.2d 698 (2007).

Contempt finding against a former spouse relating to a property distribution portion of a divorce decree had to be affirmed because the former spouse failed to secure the transmittal to the appellate court of a transcript of the contempt hearing as required by O.C.G.A. § 5-6-41(c). *Morris v. Morris*, 284 Ga. 748, 670 S.E.2d 84 (2008).

Duty of defendant. — It is the duty of the defendant to include in the record those items which will enable the appellate court to perform an objective review of the evidence and proceedings, and where the transcript is necessary and defendant omits it from the record on appeal, the appellate court must assume that the judgment below was correct and affirm. *Magnolia Court Apts., Inc. v. City of Atlanta*, 249 Ga. App. 6, 545 S.E.2d 643 (2001).

Defendant was not entitled to remand for a second hearing on reconstructing a transcript where procedures followed by the trial court at the first remand hearing complied with the provisions of subsection (f). *Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997), cert. denied, 522 U.S. 921, 118 S. Ct. 313, 139 L. Ed. 2d 242 (1997).

Amendments to correct typographical errors authorized. — Trial court was authorized by subsection (f) to accept amendments to the transcript in order to correct typographical errors. *Bates v. State*, 228 Ga. App. 140, 491 S.E.2d 200 (1997).

Procedure appropriate in felony case, etc.

Where a portion of the court reporter's tapes of a felony trial was deleted, the trial court did not err in following the prescribed procedure for supplementation of the trial transcript even though the defendant did not participate in the process. *Stubbs v. State*, 220 Ga. App. 106, 469 S.E.2d 229 (1996); *Turner v. State*, 226 Ga. App. 348, 486 S.E.2d 639 (1997).

Transcript omitting bench conferences. — Where defendant argued on appeal that the bench conferences at defendant's criminal trial were not transcribed, but defendant failed to follow the O.C.G.A. § 5-6-41 procedure for completing the transcript, defendant was unable to show error or harm regarding the bench conferences. *Morrison v. State*, 256 Ga. App. 23, 567 S.E.2d 360 (2002).

Transcript correction not allowed.

— Trial court properly dismissed defendant's motion to correct the transcript of defendant's trial for murder and aggravated assault, which alleged that the transcript was altered to suppress exculpatory evidence; other than defendant's assertion that conflicting testimony evidenced a defective transcript, there was nothing to indicate that the detective's testimony was altered during transcription. *Wright v. State*, 275 Ga. 788, 573 S.E.2d 361 (2002).

Transcript of district attorney's closing argument.

The claim of improper closing argument by co-defendant's counsel was deemed abandoned where the closing argument was not transcribed, and defendant did not supplement the record with a stipulation pursuant to subsection (g) of this section. *Cox v. State*, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

Motion to perfect record not proper. — Defendant's filing of a "motion to perfect the record," offering the testimony of a witness as to what transpired during a portion of the trial, was not a proper vehicle for perfecting the record pursuant to this section. *Whitt v. State*, 215 Ga. App. 704, 452 S.E.2d 125 (1994).

Supplementation of record after appellate court renders decision.

Subsection (f) is not to be used after

rendition of an appellate court's decision as a vehicle to secure the grant of a motion for reconsideration or application for certiorari. Once the appellate court renders its decision, § 5-6-48 becomes the exclusive method for supplementing the record. *Hirsch v. Joint City County Bd. of Tax Assessors*, 218 Ga. App. 881, 463 S.E.2d 703 (1995).

Written motion to supplement not required. — By participating in the state's attempt to supplement the record during a hearing on a motion for new trial, a defendant acquiesced in the state's presentation of the state's theory that the trial court's admonition to the defendant of the right to testify was missing from the record, and it was not necessary that the state file a written motion under O.C.G.A. § 5-6-41(f) to supplement the record. *State v. Nejad*, 286 Ga. 695, 690 S.E.2d 846 (2010).

Lost transcripts. — Plaintiff's motion for a new trial because transcripts and exhibits were lost or destroyed by the court reporter was properly denied where the trial court followed the proper procedure in recreating a narrative transcript, and evidence in the available transcript and the narrative transcript supported the jury's verdict. *Xiong v. Landford*, 226 Ga. App. 126, 485 S.E.2d 534 (1997).

Defendants failed to meet their burden to affirmatively show error by the record when they failed to include in the record those items that would enable the court to perform an objective review of the evidence and proceedings, pursuant to subsection (c), by not including a transcript or a statutorily authorized substitute. *City of Byron v. Betancourt*, 242 Ga. App. 71, 528 S.E.2d 841 (2000).

Entirety of record required. — Trial court's denial of defendant's motion to vacate a sentence was affirmed because defendant did not request that the entire record be transmitted to the appellate court, and, therefore the appellate court was required to assume that the trial court ruled correctly. *Arnold v. State*, 276 Ga. App. 680, 624 S.E.2d 258 (2005).

Failure to correct inaccurate transcript. — Inmate's habeas petition alleging a defective plea was properly denied because, although the inmate pled at a

group hearing, the transcript showed that the defendants stated that the defendants knew the rights the defendants were giving up; among other things, the inmate did not pursue any remedy in the trial court to correct an inaccurate transcript pursuant to O.C.G.A. § 5-6-41(f). *Bullard v. Thomas*, 285 Ga. 545, 678 S.E.2d 897 (2009).

Stipulated Transcripts

Submission of transcript prepared by recollection.

State's motion to dismiss defendant's appeal was denied; a transcript prepared by recollection was properly before the appellate court, because according to O.C.G.A. § 5-6-41(d), (f) and (g), a transcript prepared from recollection did not need judicial approval or intervention unless the parties could not agree on what transpired, and here, defendant and the state agreed on the transcript prepared by recollection and both parties signed the agreement, and according to O.C.G.A. § 5-6-41(g), the agreement of the parties thereto or their counsel entitled such transcript to be filed as a part of the record in the same manner and with the same binding effect as a transcript filed by the court reporter. *Branton v. State*, 258 Ga. App. 221, 573 S.E.2d 475 (2002).

Judicial approval required.

Appellate court affirmed the trial court's award of summary judgment, as there was no transcript of the hearing on the motion, and the plaintiff had presented evidence at the hearing; furthermore, no narrative transcript was available under O.C.G.A. § 5-6-41(g), as the trial judge made clear that the trial judge could not recall what transpired at the hearing. *Tanks v. Greens Owners Ass'n*, 281 Ga. App. 277, 635 S.E.2d 872 (2006).

Trial court is final arbiter, etc.

In accord with 1st paragraph in bound volume. See *Whitt v. State*, 215 Ga. App. 704, 452 S.E.2d 125 (1994).

Judicial approval required. —

Where the trial court did not approve plaintiff's motion to certify a transcript which he prepared from memory and which defendants contested, the decision was final and nonreviewable. *Saleem v.*

Snow, 217 Ga. App. 883, 460 S.E.2d 104 (1995).

Statement of testimony, etc.

Where the state refused to stipulate to defendant's transcript because the witnesses were unable to remember their testimony and the trial judge indicated on the front of the proposed stipulation that he did not remember what transpired at the trial, the appellate court could not consider defendant's challenge to the sufficiency of the evidence. *Wright v. State*, 215 Ga. App. 569, 452 S.E.2d 118 (1994).

Videotape. — Under O.C.G.A. § 5-6-41(f), the appellate court could consider alleged error regarding the trial court's failure to redact portions of a videotape used at trial even though the videotape was not part of the record on appeal, where the parties stipulated to the contents of the disputed portion of the videotape. *Priebe v. State*, 250 Ga. App. 725, 553 S.E.2d 5 (2001).

Record insufficient to permit appellate review. — Defendant's Batson challenge failed because the defendant did not satisfy the defendant's burden under O.C.G.A. § 5-6-41 to have the record completed; the recollections of the defendant and the state about what happened in jury selection did not provide a basis for appellate review as colloquies between court and counsel and argument of counsel were not competent evidence of the facts observed therein and did not suffice to make a proper record of facts required to establish a prima facie case of discrimination. *Acey v. State*, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

Action did not comply with the procedures governing the preparation of the record for appeal, O.C.G.A. § 5-6-41(g), because although an insured did not object to the introduction of the affidavit of a driver's lawyer attesting to the trial court's voir dire procedures, the methods of preparing a transcript by recollection as set out in O.C.G.A. § 5-6-41 were not followed; the court of appeals could not consider the lawyer's unilateral attempt to provide a potentially biased account of what transpired in the trial court. *Sibley v. Dial*, No. A11A1700, 2012 Ga. App. LEXIS 2 (Jan. 6, 2012).

Expenses of Recordation and Transcription

Court not required to record proceedings. — While any party may, as a matter of right, have a case reported at that party's expense, this section does not require a trial court in a civil action to have the proceedings and evidence reported by a court reporter. *Finch v. Brown*, 216 Ga. App. 451, 454 S.E.2d 807 (1995).

Parties must bear transcription costs in civil cases and a trial court did not err in denying a request for public funds to cover transcription costs of a summary judgment hearing. *Saleem v. Snow*, 217 Ga. App. 883, 460 S.E.2d 104 (1995).

No express refusal to pay obtained. — A trial court erred in a civil suit by denying an appealing plaintiff's motions for a trial transcript and for a new trial based on not having a transcript as a pretrial order did not qualify as an express ruling that the plaintiff expressly refused to pay for the costs of the transcript. Further, the pretrial order in no way qualified as a ruling invoked at the commencement of the proceedings. *Moore v. Ctr. Court Sports & Fitness, LLC*, 289 Ga. App. 596, 657 S.E.2d 548 (2008), cert. denied, 2008 Ga. LEXIS 463 (Ga. 2008).

Application

Supreme Court of Georgia declined to address the defendant's enumeration challenging the trial court's ruling on the supplemental issue raised at a hearing to reconstruct the evidence, as the filing of a notice of appeal divested the trial court of jurisdiction to consider that issue. Moreover, while O.C.G.A. § 5-6-41(f) allowed the trial courts to retain some control over the record on appeal in certain instances, the statute's purpose was solely to make the record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact. *Ruffin v. State*, 283 Ga. 87, 656 S.E.2d 140 (2008).

Litigant's failure to arrange for court reporter. — Trial court did not err in denying a bank customer's motion to record all proceedings in a bank's action against the customer. The customer had

notice of the hearing and could have arranged for a court reporter to be present, and the trial court advised the customer that a court reporter was available. *Vadde v. Bank of Am.*, 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010); cert. denied, U.S. , 131 S. Ct. 298, 178 L. Ed. 2d 143 (2010).

Failure to transcribe certain proceedings. — Trial court did not err in failing to take down certain bench conferences, objections to closing arguments, questions from the jury, and the court's responses to jury questions because defendant could not show prejudice from this purported nonfeasance and no attempt was made to amend or to supplement the record. *Boone v. State*, 250 Ga. App. 133, 549 S.E.2d 713 (2001).

Failure to record telephonic hearing. — Driver's claim that the trial court erred in denying the driver's motion for continuance based on the driver's expert's unavailability during the week of trial was not preserved for review because the driver did not have the telephonic hearing of the motion transcribed or otherwise complete the record under O.C.G.A. § 5-6-41(f). *Pointer v. Roberts*, 288 Ga. 150, 702 S.E.2d 130 (2010).

Failure to order reconstruction. — Because defendant did not have the record completed by reconstruction, the appellate court could not determine that any harm was done by the failure to record bench conferences. *Atkins v. State*, 253 Ga. App. 169, 558 S.E.2d 755 (2002).

Motion to establish transcript properly denied. — In a case involving a dispute over an estate, the trial court did not err by denying an administrator's motion for a transcript of the bench trial as the record indicated that the administrator, and the opposing side, wanted to proceed with the trial without a court reporter as neither wanted to incur the cost and, therefore, waived the right to have one reconstructed. *Barker v. Elrod*, 291 Ga. App. 871, 663 S.E.2d 289 (2008).

Failure to have record completed. — Defendant waived any error in the admission of photographs, admitted over defendant's objection, as defendant failed to place the basis for the objection on the

record or to have the record completed under O.C.G.A. § 5-6-41(f). *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

While the trial judge might require the parties to have the proceedings reported, even if such was done, it remained the appellant's duty to have the transcript prepared for purposes of an appeal; hence, a claim that the probate court erred in not ordering that a record be made of the hearings lacked merit. *LaFavor v. LaFavor*, 282 Ga. App. 753, 639 S.E.2d 633 (2006).

Supreme court could not review the defendant's claim that the trial court set pretrial bond in an excessive and unreasonable amount because the defendant failed to have the record completed pursuant to O.C.G.A. § 5-6-41; testimony at the hearing on the motion for new trial was not a sufficient substitute for a transcript, and without a transcript of the bond hearing or a statutorily authorized substitute, the supreme court had to assume that the trial court's judgment was correct. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Plaintiff's attempt to supplement the record with affidavits from their attorneys stating that an oral request for qualification of prospective jurors was made prior to jury voir dire did not comply with the dictates of subsection (f), and thus created no record evidence for purposes of appeal. *Hardy v. Tanner Medical Ctr., Inc.*, 231 Ga. App. 268, 499 S.E.2d 121 (1998).

An addendum to a court order containing findings of fact in a child custody proceeding could not substitute as a trial transcript because it was not prepared in accordance with this section. *Burger v. Krueger*, 224 Ga. App. 179, 480 S.E.2d 230 (1996).

Presumption that trial court acted correctly when no transcript prepared.

Where defendants argued that the trial court erred in denying their motions for retrial, and defendants failed to provide a complete appellate record containing defendants' motions for retrial or the trial court's rulings, defendants did not satisfy their burden under O.C.G.A. § 5-6-41, and the appellate court could not review the issue. *Bollinger v. State*, 259 Ga. App. 102, 576 S.E.2d 80 (2003).

Sheriff's claim that a corporation failed to prove that a defendant in fieri facias transferred its rights to the excess funds generated in a tax sale was rejected as the sheriff failed to file a transcript or a stipulation of evidence in lieu of a transcript pursuant to O.C.G.A. § 5-6-41(i); the trial court proceedings were entitled to a presumption of regularity and the appellate court had to assume that the trial court's findings were supported by sufficient competent evidence. *Barrett v. Marathon Inv. Corp.*, 268 Ga. App. 196, 601 S.E.2d 516 (2004).

Bank's writ of possession for a foreclosed property was affirmed as a tenant in sufferance failed to file a transcript or a statutorily-authorized substitute; the evidence was assumed to support the grant of the writ of possession. *Wimbley v. Washington Mut. Bank*, 271 Ga. App. 477, 610 S.E.2d 124 (2005).

Trial court's grant of a writ of possession to a lessor was presumed to be correct as the lessee's claims that the lessor waived the parking provision and that the default notice was improperly sent, required a review of the evidence submitted at trial; the lessee failed to file a transcript and did not attempt to reconstruct the transcript as allowed by O.C.G.A. § 5-6-41(g) and (i). *Great Lake Enters. v. AJK Group, Inc.*, 272 Ga. App. 439, 612 S.E.2d 606 (2005).

Trial court's finding that an injured party did not dismiss a suit before the party was found in contempt of the trial court's order awarding a company an attorney fee for the injured party's discovery violations was presumed to be supported by the evidence as the injured party failed to include a transcript or a legally acceptable substitute in the record on appeal. *Collier v. D & N Trucking Co.*, 273 Ga. App. 271, 614 S.E.2d 801 (2005).

As a condominium unit owner's appeal from a contempt order of the trial court did not include a transcript of the trial court proceedings or a recreation of the record as provided for in O.C.G.A. § 5-6-41(g) and (i), the owner failed in the burden of proof and the appellate court presumed that the evidence supported the trial court judgment. *Schroder v. Murphy*, 282 Ga. App. 701, 639 S.E.2d 485 (2006), cert. denied, 2007 Ga. LEXIS 220 (Ga. 2007).

On appeal from a stalking conviction, because the record failed to show that the oath was not administered to the jury, no reversible error existed, and the appeals court had to presume that the jury was sworn. *Benton v. State*, 286 Ga. App. 736, 649 S.E.2d 793 (2007), cert. denied, 2007 Ga. LEXIS 753 (Ga. 2007).

Because commercial tenant, appealing pro se, had not requested a transcript or submitted authorized substitute under O.C.G.A. § 5-6-41, and had expressly noted in notice of appeal that none would be submitted, court had to presume that judgment granting a writ of possession to landlord was correct. *Keita v. K & S Trading*, 292 Ga. App. 116, 663 S.E.2d 362 (2008).

Although a tenant appealing a writ of possession in favor of a landlord made various arguments based on factual issues that required consideration of the evidence presented to the trial court, the tenant failed to file a transcript of the proceedings and failed to reconstruct the proceedings in accordance with O.C.G.A. § 5-6-41(g) and (i); the tenant had the burden to show error by the record, but failed to provide any evidence to support the allegations. It was thus presumed that the trial court's order was correct. *Siratu v. Diane Inv. Group*, 298 Ga. App. 127, 679 S.E.2d 359 (2009).

Although a hearing was held at which the defendant's counsel attempted to perfect the record pursuant to O.C.G.A. § 5-6-41(g), no evidence of what was presented at trial was put on, and the parties did not reach an agreement as to what had transpired at the trial. There being no transcript of the trial, the court was bound to assume that the defendant's convictions were supported by sufficient evidence. *Ford v. State*, 306 Ga. App. 606, 703 S.E.2d 71 (2010).

When a wife appealed a trial court's decision to enforce the parties' postnuptial agreement but she failed to provide a transcript under O.C.G.A. § 5-6-41, it was assumed that findings that there was full and fair disclosure of the husband's financial condition prior to execution of the agreement were supported by sufficient competent evidence. *Spurlin v. Spurlin*, 289 Ga. 818, 716 S.E.2d 209 (2011).

Imposition of a penalty for a frivolous appeal was warranted where the appellant failed to include the hearing transcript or authorized substitute in the record and could have no reasonable belief that the court would reverse the judgment of the trial court. *Trevino v. Flanders*, 231 Ga. App. 782, 501 S.E.2d 13 (1998).

Certification of reconstructed transcript. — Where defendant challenged the sufficiency of the evidence at his trial, defendant's simply pointing out the absence of a ruling in the record on defendant's motion to certify a reconstructed transcript did not carry the burden of showing that the trial court refused to rule on a reconstructed transcript, and since there was no transcript of the trial, the appellate court was bound to assume that defendant's conviction was supported by evidence. *Goodwin v. State*, 251 Ga. App. 549, 554 S.E.2d 317 (2001).

Failure to timely file transcript. — Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. *Dye v. U.S. Bank Nat'l Ass'n*, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48, that the appellant's delay in filing a transcript was unreasonable and inexcusable, and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, and at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. *Lavalle v.*

Jarrett, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Trial court did not abuse the court's discretion in dismissing parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parent's delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed their notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. *Bush v. Reed*, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's

discretion, pursuant to O.C.G.A. § 5-6-48(c), in granting the appellee's motion to dismiss with regard to the transcript on appeal because the appellants' delay in filing the transcript, pursuant to O.C.G.A. §§ 5-6-41(c) and 5-6-42, was unreasonable, inexcusable, and caused by the appellants. *Pistacchio v. Frasso*, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Police officer's testimony. — In the absence of a transcript for review, the appellate court could assume as a matter of law that a police officer's testimony was sufficient to support a conviction. *Jones v. State*, 226 Ga. App. 608, 487 S.E.2d 89 (1997).

Failure to swear jury in criminal trial. — If the trial court failed to swear the jury in a criminal case, defendant's remedy was to have the record corrected pursuant to the provisions of O.C.G.A. § 5-6-41(f). *Keller v. State*, 261 Ga. App. 769, 583 S.E.2d 591 (2003).

RESEARCH REFERENCES

ALR. — Failure or refusal of state court judge to have record made of bench con-

ference with counsel in criminal proceeding, 31 ALR5th 704.

5-6-42. Procedure for preparation and filing of transcript of evidence and proceedings where appellant designates matter to be omitted from record on appeal; extensions of time for completion of transcript.

Law reviews. — For survey article on appellate practice and procedure, see 59 *Mercer L. Rev.* 21 (2007). For survey arti-

cle on appellate practice and procedure, see 60 *Mercer L. Rev.* 21 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
TIMELY FILING OF TRANSCRIPT
COST OF TRANSCRIPT

General Consideration

Appellant must prepare and file transcript.

Supreme court could not review the defendant's claim that the trial court set pretrial bond in an excessive and unreasonable amount because the defendant

failed to have the record completed pursuant to O.C.G.A. § 5-6-41; testimony at the hearing on the motion for new trial was not a sufficient substitute for a transcript, and without a transcript of the bond hearing or a statutorily authorized substitute, the supreme court had to assume that the

trial court's judgment was correct. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Transcript of hearing on motion for summary judgment. — Trial court did not err in ruling that the transcript of the hearing on a manufacturer's motion for summary judgment accurately portrayed what had occurred at the hearing because the certification of the transcript met the requirements of O.C.G.A. § 15-14-5, and a driver had the burden to seek corrective action under O.C.G.A. § 5-6-41(f). *Udoinyion v. Michelin N. Am., Inc.*, 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Cited in *Jackson v. Beech Aircraft Corp.*, 217 Ga. App. 498, 458 S.E.2d 377 (1995); *Plumides v. American Engines & Transmissions, Inc.*, 227 Ga. App. 885, 490 S.E.2d 552 (1997); *Hameed v. Hall*, 234 Ga. App. 890, 508 S.E.2d 680 (1998); *Durden v. Griffin*, 270 Ga. 293, 509 S.E.2d 54 (1998); *Bass v. Mercer*, 240 Ga. App. 545, 524 S.E.2d 260 (1999); *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674, 530 S.E.2d 800 (2000); *Holy Fellowship Church of God in Christ v. First Community Bank*, 242 Ga. App. 400, 530 S.E.2d 24 (2000); *Ball v. Fulton-DeKalb Hosp. Auth.*, 258 Ga. App. 899, 576 S.E.2d 1 (2002).

Timely Filing of Transcript

Appellant bears burden of timely filing transcript or obtaining extension.

Where minor failed to file the transcript within 30 days of the time the minor filed the notice of appeal as required by O.C.G.A. § 5-6-42, or did not offer assurances of when it might have been filed, the juvenile court did not abuse the court's discretion in dismissing the minor's appeal and finding the delay unreasonable. *In re C.F.*, 255 Ga. App. 93, 564 S.E.2d 524 (2002).

Appellant's inaction results in dismissal. — Dismissal was proper where appellant's inaction caused a delay of nine months between the notice of appeal and delivery of the transcript. *In re D.M.C.*, 232 Ga. App. 466, 501 S.E.2d 305 (1998).

Statutory law placed burden not only of paying for transcript, but making sure it was filed, on the party taking the appeal, and since the patient had that burden and

shirked that responsibility, resulting in a greater than three-year delay that prejudiced the surgical business and doctor, the trial court was entitled to involuntarily dismiss the patient's appeal. *Atlanta Orthopedic Surgeons v. Adams*, 254 Ga. App. 532, 562 S.E.2d 818 (2002).

Since a construction company bringing an appeal of a jury verdict in favor of homeowners never sought an extension of time to file the transcript from the post-trial hearing on its motions for new trial and judgment notwithstanding the verdict, nor communicated with the court reporter during the nine-month period after the hearing, the record did not support the trial court's finding that the delay in filing that transcript caused by the construction company was excusable and the trial court's denial of the homeowners' motion to dismiss the appeal was error; the record showed that the construction company's actions delayed a just disposition of the case by delaying the docketing of the appeal and hearing of the case by the appellate court, and, consequently, the homeowners were forced to wait for a final disposition on the construction company's appeal of the verdict against it. *Coptic Constr. Co. v. Rolle*, 279 Ga. App. 454, 631 S.E.2d 475 (2006).

Effect of failure to timely file transcript, etc.

See *Burns v. Howard*, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

In accord with *Barmore v. Himebaugh*. See *Dalton v. Thanh Tam Vo*, 224 Ga. App. 382, 480 S.E.2d 377 (1997).

Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. *Dye v. U.S. Bank Nat'l Ass'n*, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Trial court did not err in dismissing the litigant's appeal where the litigant had not filed the transcript 110 days after the notice of appeal was filed; the litigant's claim of poverty was contradicted by the litigant's trip to India during the time the appeal was pending. *Roy v. Shetty*, 274 Ga. App. 8, 616 S.E.2d 208 (2005).

Appeal was properly dismissed for failure to timely file a transcript under O.C.G.A. § 5-6-42 since the 150 day delay in filing the transcript was unreasonable under O.C.G.A. § 5-6-48, in that it resulted in a delay of the consideration of the appeal for another term and affected the appellee's ability to administer the estate in question; the delay was inexcusable since the record indicated that the attorney had the transcript when the attorney filed the notice of appeal. *Adams v. Hebert*, 279 Ga. App. 158, 630 S.E.2d 652 (2006).

Trial court did not abuse the court's discretion by dismissing a security corporation's appeal of a civil judgment against the corporation as a result of having failed to have filed a transcript within 30 days as required by O.C.G.A. § 5-6-42. Since no transcript existed, the appellate court was unable to determine whether the security corporation had rebutted the presumption that the filing of the transcript 49 days after the 30-day statutory deadline for filing transcripts was unreasonable and no extension was requested. *Pioneer Sec. & Investigations, Inc. v. Hyatt Corp.*, 295 Ga. App. 261, 671 S.E.2d 266 (2008).

Dismissal proper where transcript not timely filed, etc.

Delay of 112 days between the filing of the notice of appeal and completion of the transcript warranted dismissal of the appeal. *Smith v. Simpson*, 231 Ga. App. 109, 497 S.E.2d 663 (1998).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48 and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, but at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was re-

manded to the trial court. *Lavalle v. Jarrett*, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Trial court did not abuse the court's discretion in dismissing parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parents delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed the parents notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. *Bush v. Reed*, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion in finding that a mother's failure to timely pursue the filing of the transcript from the mother's parental rights termination hearing or seek an extension of time for almost one year was unreasonable and inexcusable and in dismissing the appeal under O.C.G.A. § 5-6-48(a). In the Interest of T.H., 311 Ga. App. 641, 716 S.E.2d 724 (2011).

Trial court did not abuse the court's discretion, pursuant to O.C.G.A. § 5-6-48(c), in granting the appellee's motion to dismiss with regard to the transcript on appeal because the appellants' delay in filing the transcript, pursuant to O.C.G.A. §§ 5-6-41(c) and 5-6-42, was unreasonable, inexcusable, and caused by the appellants. *Pistacchio v. Frasso*, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Delay in filing of transcript is not necessarily cause for dismissal. — Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. *Fulton County Bd. of Tax Assessors v.*

Love, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Remand for requisite finding.

Trial court did not abuse its discretion in granting a dismissal of the plaintiff's appeal, pursuant to O.C.G.A. § 5-6-42, because the plaintiff failed to file a transcript for the plaintiff's appeal for more than 17 months after the plaintiff filed the notice of appeal, the plaintiff never sought an extension of time under O.C.G.A. § 5-6-39, and the court held that the plaintiff's action was unreasonable, inexcusable, and caused by the plaintiff's own conduct; there was no requirement that a hearing be held on the motion to dismiss, pursuant to O.C.G.A. § 5-6-48(c), as the plaintiff was only entitled to an opportunity to be heard, which the plaintiff received. *Lemmons v. Newton*, 269 Ga. App. 880, 605 S.E.2d 626 (2004).

Cost of Transcript

Costs of preparing transcript are not recoverable.

When defendant in court below and on appeal only briefly asserted that those items included in the record were unnecessary to the appeal, without explaining or arguing the issue in any detail, trial court had ample grounds to find that defendant failed in the burden to show that costs should be apportioned. *Jacques v. Murray*, 290 Ga. App. 334, 659 S.E.2d 643 (2008).

Delay in paying costs. — Delay of slightly more than 30 days in paying the bill of costs because of appellant's medical condition was properly found to be neither unreasonable nor inexcusable. *Poythress v. Savannah Airport Comm'n*, 229 Ga. App. 303, 494 S.E.2d 76 (1997).

5-6-43. Preparation and transmittal of record on appeal by court clerk; retention of copy by clerk; furnishing at no cost to Attorney General in capital cases; notification where defendant confined to jail.

(a) Within five days after the date of filing of the transcript of evidence and proceedings by the appellant or appellee, as the case may be, it shall be the duty of the clerk of the trial court to prepare a complete copy of the entire record of the case, omitting only those things designated for omission by the appellant and which were not designated for inclusion by the appellee, together with a copy of the notice of appeal and copy of any notice of cross appeal, with date of filing thereon, and transmit the same, together with the transcript of evidence and proceedings, to the appellate court, together with his certificate as to the correctness of the record. Where no transcript of evidence and proceedings is to be sent up, the clerk shall prepare and transmit the record within 20 days after the date of filing of the notice of appeal. If for any reason the clerk is unable to transmit the record and transcript within the time required in this subsection or when an extension of time was obtained under Code Section 5-6-39, he shall state in his certificate the cause of the delay and the appeal shall not be dismissed. The clerk need not recopy the transcript of evidence and proceedings to be sent up on appeal but shall send up the reporter's original and retain the copy, as referred to in Code Section 5-6-41; and it shall not be necessary that the transcript be renumbered as a part of the record on appeal. The clerk shall retain an exact duplicate copy of all records and the transcript sent up, with the same pagination, in his office as a permanent record.

(b) Where the accused in a criminal case was convicted of a capital felony, the clerk shall likewise furnish, at no cost, the Attorney General with an exact copy of the record on appeal.

(c) Where a defendant in a criminal case is confined in jail pending appeal, it shall be the duty of the clerk to state that fact in his certificate; and it shall be the duty of the appellate court to expedite disposition of the case.

(d) Where a transcript of evidence and proceedings is already on file at the time the notice of appeal is filed, as where the transcript was previously filed in connection with a motion for new trial or for judgment notwithstanding the verdict, the clerk shall cause the record and transcript (where specified for inclusion) to be transmitted as provided in subsection (a) of this Code section within 20 days after the filing of the notice of appeal. (Ga. L. 1965, p. 18, § 12; Ga. L. 1966, p. 493, § 5; Ga. L. 1968, p. 1072, § 6; Ga. L. 1981, p. 1396, § 15; Ga. L. 1992, p. 6, § 5; Ga. L. 2011, p. 24, § 1/HB 41.)

The 2011 amendment, effective March 16, 2011, in subsection (b), inserted “, at no cost,” and deleted “, for which the clerk shall receive a fee as required by paragraph (6) of subsection (h) of Code Section 15-6-77, to be paid out of funds appropriated to the Department of Law” following “record on appeal”. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2011, p. 24, § 4, not codified by the General Assembly, provides that the amendment by that Act shall apply retroactively to all cases for which fees have not been assessed.

Law reviews. — For article, “Setting the Record Straight: A Proposal to Save Time and Trees,” see 14 Ga. St. B.J. 14 (2008).

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Appellant not obligated to prepare record, etc.

In accord with *Long v. City of Midway*. See *Holy Fellowship Church of God in Christ v. First Community Bank*, 242 Ga. App. 400, 530 S.E.2d 24 (2000).

Consideration of clerk’s certificate. — Although a court clerk’s certificate under O.C.G.A. § 5-6-43 that was attached to a record on appeal indicated that the delay in the transmission of the record was not due to any fault by the insurer that had appealed, as the certificate was dated months after the trial court dismissed an earlier appeal under O.C.G.A. § 5-6-48(c), it was clearly not considered by the trial court in the court’s dismissal decision and, accordingly, it was not considered by the appellate court on appeal from the dismissal. *ACCC Ins. Co. v. Pizza Hut of Am., Inc.*, No. A11A1905, 2012 Ga. App. LEXIS 127 (Feb. 10, 2012).

Clerk of court liable for attorney’s fees to litigant for failure to prepare and transmit record. — Clerk of court was liable to a litigant for attorney’s fees under O.C.G.A. § 9-15-14 based on the clerk’s failure to prepare and transmit the record in the litigant’s case to the appellate court as required by O.C.G.A. § 5-6-43 until six months after the record should have been prepared, and then only when the litigant filed a petition for mandamus, to which the clerk interposed meritless defenses. *Robinson v. Glass*, 302 Ga. App. 742, 691 S.E.2d 620 (2010).

Cited in *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674, 530 S.E.2d 800 (2000); *Wilbanks v. State*, 251 Ga. App. 248, 554 S.E.2d 248 (2001); *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004); *Purvis v. State*, 288 Ga. 865, 708 S.E.2d 283 (2011); *Pistacchio v.*

Frasso, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

5-6-45. Operation of notice of appeal as supersedeas in criminal cases; bond; review.

(a) In all criminal cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supersedeas in all cases where a sentence of death has been imposed or where the defendant is admitted to bail. If the sentence is bailable, the defendant may give bond in an amount prescribed by the presiding judge, with security approved by the clerk, conditioned upon the defendant's personal appearance to abide the final judgment or sentence of the court. If the judgment or sentence is or includes a fine which is unconditionally required to be paid, and is not required to be paid over a period of probation, nor as a condition of a suspended or probated sentence, nor as an alternative sentence, the bond may also be conditioned upon payment of the fine at the time the defendant appears to abide the final judgment or sentence.

(b) If the defendant is a corporation which has been convicted as provided in Code Section 17-7-92, the presiding judge, on the motion of the defendant, prosecuting attorney, or on its own motion, may order that supersedeas be conditioned upon the posting of a supersedeas bond. Said order may be entered either before or after the filing of a motion for a new trial or notice of appeal. The bond shall be in an amount prescribed by the presiding judge, with security approved by the clerk, conditioned upon the defendant's appearance, by and through a corporate officer, agent, or attorney at law, to satisfy the judgment, together with all costs and interest. If the corporation fails to make the bond as ordered, the prosecuting attorney or other proper officer may use any and all lawful process and procedures available to enforce and collect the judgment. Should final judgment be entered in favor of the defendant, the presiding judge shall order a refund of all amounts collected in satisfaction of the judgment. The State of Georgia, and its political subdivisions, district attorney, solicitor-general, sheriff, marshal, all other proper officers, and all agents and employees of the aforementioned persons shall be immune from all civil liability for acts and attempts to enforce and collect a judgment under this subsection.

(c) Any supersedeas bond may be reviewed by the presiding judge on the motion of defendant, prosecuting attorney, or on its own motion, and the court may require new or additional security, or order the bond strengthened, increased, reduced, or otherwise amended as justice may reasonably require. (Laws 1845, Cobb's 1851 Digest, pp. 449, 453; Code 1863, § 4171; Code 1868, § 4203; Code 1873, § 4263; Code 1882, § 4263; Penal Code 1895, § 1077; Penal Code 1910, § 1104; Code 1933,

§ 6-1005; Ga. L. 1965, p. 18, § 7; Ga. L. 1984, p. 413, § 1; Ga. L. 1992, p. 6, § 5; Ga. L. 1996, p. 748, § 9.)

The 1996 amendment, effective July 1, 1996, substituted “solicitor-general” for “solicitor” in the last sentence of subsection (b).

Editor’s notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: “Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law.”

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: “The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1.”

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: “Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court.”

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: “(a) Except as provided in subsection (b) of this section, this Act shall become effective on July 1, 1996.

“(b) The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general.”

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General Consideration

Power of supersedeas. — Notice of appeal did not serve as a supersedeas and generally divested the trial court of jurisdiction to alter or execute a judgment of conviction since defendant had not been found guilty of theft by receiving, and thus there was no judgment of conviction to appeal *Reedman v. State*, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

Jurisdiction of trial court. — Pendency of an appeal in the Supreme Court of Georgia did not deprive the trial court

of jurisdiction to issue an order granting the defendant an out-of-time appeal. *Porter v. State*, 308 Ga. App. 121, 706 S.E.2d 620 (2011).

Appellate court lacked jurisdiction over bail conditions. — Appellate court was without jurisdiction to consider defendant’s arguments regarding bail conditions because under O.C.G.A. § 5-6-45(c), such conditions were reviewable by the trial court. *Barnett v. State*, 275 Ga. App. 464, 620 S.E.2d 663 (2005).

Cited in *Serpentfoot v. State*, 241 Ga. App. 35, 524 S.E.2d 516 (1999).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 702.

5-6-46. Operation of notice of appeal as supersedeas in civil cases; requirement of supersedeas bond or other form of security; fixing of amount; procedure upon no or insufficient filing; effect of bond as to liability of surety; punitive damages.

(a) In civil cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supersedeas upon payment of all costs in the trial court by the appellant and it shall not be necessary that a supersedeas bond or other form of security be filed; provided, however, that upon motion by the appellee, made in the trial court before or after the appeal is docketed in the appellate court, the trial court shall require that supersedeas bond or other form of security be given with such surety and in such amount as the court may require, conditioned for the satisfaction of the judgment in full, together with costs, interest, and damages for delay if the appeal is found to be frivolous. When the judgment is for the recovery of money not otherwise secured, the amount of the bond or other form of security shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a lesser amount. When the judgment determines the disposition of the property in controversy as in real actions, trover, and actions to foreclose mortgages and other security instruments, or when such property is in the custody of the sheriff or other levying officer, or when the proceeds of such property or a bond for its value are in the custody or control of the court, the amount of the supersedeas bond or other form of security shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(b) Notwithstanding subsection (a) of this Code section, in any civil case under any legal theory, including cases involving individual, aggregated, class-action, or otherwise joined claims, the amount of supersedeas bond or other form of security to be furnished during the pendency of all appeals or discretionary reviews of any judgment granting legal, equitable, or any other form of relief or damages, including compensatory, special, punitive, exemplary, or other damages, in order to stay execution of the judgment during the entire course of appellate review by any court shall be set in accordance with applicable laws or court rules, but the total supersedeas bond or other

form of security that is required of all appellants collectively shall not exceed \$25 million regardless of the value of the judgment.

(c) If supersedeas bond or other form of security is not filed within the time specified by the judge, or if the bond or other form of security filed is found insufficient, a bond or other form of security may be filed at such time as may be fixed by the trial court.

(d) By entering into an appeal or supersedeas bond or other form of security given pursuant to this Code section, the surety submits himself or herself to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of notice or an independent action.

(e) Nothing in this Code section shall deprive the superior courts of their separate power to grant supersedeas under paragraph (1) of Code Section 15-6-9 nor deprive the appellate courts of the power to grant supersedeas in such manner as they may determine to meet the ends of justice.

(f) If an appellee proves by a preponderance of the evidence that a party bringing an appeal, for whom the supersedeas bond or other form of security has been limited pursuant to subsection (b) of this Code section, is dissipating or secreting its assets, or diverting assets outside the ordinary course of business to avoid payment of a judgment, a court may require the appellant to post a bond or other form of security in an amount not to exceed the total amount of the judgment. (Laws 1845, Cobb's 1851 Digest, pp. 449, 453; Code 1863, § 4171; Code 1868, § 4203; Ga. L. 1870, p. 416, § 1; Code 1873, § 4263; Ga. L. 1880-81, p. 120, § 1; Code 1882, § 4263; Civil Code 1895, § 5552; Civil Code 1910, § 6165; Ga. L. 1917, p. 63, § 1; Code 1933, § 6-1002; Ga. L. 1965, p. 18, § 8; Ga. L. 1994, p. 346, § 1; Ga. L. 2000, p. 228, § 2; Ga. L. 2001, p. 4, § 5; Ga. L. 2004, p. 980, § 1; Ga. L. 2005, p. 60, § 5/HB 95.)

The 2000 amendment, effective March 30, 2000, added subsections (e) and (f).

The 2001 amendment, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, substituted "\$25 million" for "\$25,000,000.00" at the end of subsection (e).

The 2004 amendment, effective May 17, 2004, inserted "or other form of security" throughout this Code section; in subsection (a), substituted "if the appeal is found to be frivolous" for ", if for any reason the appeal is dismissed or is found to be frivolous, and to satisfy in full such

modification of the judgment and such costs, interest, and damages as the appellate court may award" at the end of the first sentence and substituted "lesser amount" for "different amount or orders security other than the bond" at the end of the second sentence; added subsection (b); redesignated former subsections (b) through (d) as present subsections (c) through (e), respectively; in present subsection (d), in the first sentence, inserted "or herself" and substituted "the surety's" for "his" twice, and substituted "The surety's" for "His" at the beginning of the second sentence; deleted former subsec-

tion (e) which read: "If the appellee in a civil action obtains a judgment including punitive damages and the appellant files a notice of appeal of the judgment in order to obtain review by an appellate court, the supersedeas bond for the punitive damages portion of the judgment shall not exceed \$25 million."; and substituted the present provisions of subsection (f) for the former provisions which read: "If after notice and hearing the court finds that the appellee has proven by a preponderance of the evidence that a party bringing an appeal, for whom the supersedeas bond requirement has been limited pursuant to subsection (e) of this Code section is purposefully dissipating or secreting its assets, or diverting assets outside the jurisdiction of the United States courts, the

limitation contained in subsection (e) of this Code section shall not apply."

The 2005 amendment, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, revised the punctuation in subsection (e).

Editor's notes. — Ga. L. 2000, p. 228, § 1, not codified by the General Assembly, provides: "The Act shall be known and may be cited as the 'Civil Litigation Improvement Act of 2000.'"

Ga. L. 2004, p. 980, § 4, not codified by the General Assembly, provides that the amendment by that Act shall apply to cases pending on or filed on or after May 17, 2004.

Law reviews. — For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 37 (2000).

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GENERAL CONSIDERATION

APPLICABILITY OF AUTOMATIC SUPERSEDEAS PROVISION

EFFECT OF SUPERSEDEAS

SUPERSEDEAS BOND

General Consideration

Payment of costs in trial court is prerequisite.

Filing of notice of appeal did not serve as a supersedeas because the appellant failed to pay all costs in the trial court and all costs in the appeals preparation. *Lott v. Arrington & Hollowell, P.C.*, 258 Ga. App. 51, 572 S.E.2d 664 (2002).

A notice of appeal did not serve as a supersedeas when all costs had not been paid, and although the appellate courts do not condone a party's failure to respond to the motion to dismiss in the first instance, the trial court was not deprived of jurisdiction to consider and rule on that party's motion to set aside the dismissal. *Lunsford v. DeKalb Med. Ctr., Inc.*, 263 Ga. App. 394, 587 S.E.2d 859 (2003).

Pursuant to O.C.G.A. § 5-6-46, a notice of appeal, with payment of costs, serves as a supersedeas of the judgment appealed and deprives the trial court of jurisdiction over matters affecting such judgment. In the *Interest of W.P.B.*, 269 Ga. App. 101, 603 S.E.2d 454 (2004).

Construction with O.C.G.A.

§§ 5-6-34 and 5-6-35. — While O.C.G.A. § 5-6-35(h) provides that the filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas, that section applies only to discretionary appeals. O.C.G.A. § 5-6-34(b), which applies to interlocutory appeals, does not so provide, but states that if the appellate court issues an order granting an appeal, the applicant may then timely file a notice of appeal and the notice of appeal shall act as a supersedeas, as provided in O.C.G.A. § 5-6-46. *Nelson v. Haugabrook*, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Hearing not required. — The trial court was not required to conduct an oral hearing before granting a motion to require a supersedeas bond under the statute. *Rapps v. Cooke*, 234 Ga. App. 131, 505 S.E.2d 566 (1998).

Judgment determining disposition of property.

Borrower failed to show that the trial court abused the court's discretion in setting a \$300,000 supersedeas bond because

the case fell within the disposition-of-property provision of O.C.G.A. § 5-6-46(a); the bank argued that interest continued to accrue on the note securing the loan pending appeal, that taxes on the property were coming due, and that the appeal delayed the bank from pursuing the bank's foreclosure, confirmation, and action for deficiency judgment. *Duke Galish LLC v. SouthCrest Bank*, No. A11A1994; No. A11A2406, 2012 Ga. App. LEXIS 139 (Feb. 16, 2012).

Uniform Superior Court Rule 6.2 does not apply, etc.

In accord with *Cloud v. Georgia*. See *Rapps v. Cooke*, 234 Ga. App. 131, 505 S.E.2d 566 (1998).

No jurisdiction to order interim special master fees. — Trial court erred in ordering a property owner to immediately pay the special master fees in a quiet title action as the ultimate responsibility for the fees of the special master was directly related to the resolution of the quiet title action; the trial court lacked jurisdiction to order payment of interim fees to the special master. *Davis v. Harpagon Co., LLC*, 281 Ga. 250, 637 S.E.2d 1 (2006).

No jurisdiction to vacate default judgment. — In an unpaid wages case, a trial court lacked jurisdiction under O.C.G.A. § 5-6-46 to grant a former employer's second motion to vacate a default judgment as the employer's petition for certiorari as to the denial of the first motion to set aside was still pending when the order granting the second motion was entered. *Guthrie v. Wickes*, 295 Ga. App. 892, 673 S.E.2d 523 (2009).

Defendants in a RICO action failed to exercise the defendants' right to open a prematurely entered default judgment as a matter of right by filing an answer and costs within the 15-day period provided in O.C.G.A. § 9-11-55(a); instead, the defendants filed an appeal. Although the trial court was thereby divested of jurisdiction to alter or amend the judgment, defendants still could have opened the default as a matter of right by filing an answer and paying costs. *Florez v. State*, 311 Ga. App. 378, 715 S.E.2d 782 (2011), cert. dismissed, 2012 Ga. LEXIS 64 (Ga. 2012).

No jurisdiction after appeal filed. — Because a neighbor filed a notice of ap-

peal, the trial court lacked jurisdiction under O.C.G.A. § 5-6-46(a) to supplement, amend, alter, or modify an order purporting to dismiss two of the neighbor's complaints with prejudice. *McLeod v. Clements*, 310 Ga. App. 235, 712 S.E.2d 627 (2011).

Pursuant to O.C.G.A. § 5-6-46(a), the trial court was without jurisdiction to enter final judgment orders in favor of a bank because the orders were entered after notices of appeal as the summary judgment orders had already been filed. *Shropshire v. Alostar Bank of Commerce*, No. A11A1770; No. A11A1795; No. A11A1771, 2012 Ga. App. LEXIS 185 (Feb. 23, 2012).

Child custody proceedings. — Trial court did not exceed the court's authority in denying a former husband's motion for supersedeas to enforce an emergency order limiting a former wife's visitation and requiring the visitation to be supervised pending appeal because in the court's order resolving the supersedeas issue the trial court expressly excepted the custody and visitation provisions of the court's prior order from any supersedeas effect; the trial court found that the allegations upon which the emergency order was based were not supported by any credible evidence. *Blackmore v. Blackmore*, 311 Ga. App. 885, 717 S.E.2d 504 (2011).

Cited in *Nest Inv., Inc. v. Tzavaras*, 221 Ga. App. 282, 471 S.E.2d 223 (1996); *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1 (1999); *ARA Health Servs. v. Stitt*, 250 Ga. App. 420, 551 S.E.2d 793 (2001); *Loiten v. Loiten*, 288 Ga. App. 638, 655 S.E.2d 265 (2007); *Robinson v. Robinson*, 287 Ga. 842, 700 S.E.2d 548 (2010); *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Applicability of Automatic Supersedeas Provision

Injunction cases are exempt from automatic supersedeas.

Trial court had authority to hold a property owner in contempt for failure to comply with a court order that imposed a permanent restraining order in favor of the owner's neighbors, even though the order was on appeal, as there was no order by the court that stayed the judgment

pending appeal, pursuant to O.C.G.A. § 9-11-62(a), which was an exception to the automatic supersedeas provisions of O.C.G.A. § 5-6-46. *Knapp v. Cross*, 279 Ga. App. 632, 632 S.E.2d 157 (2006).

Appeal did not supersede court's authority to issue order. — Bank's notice of appeal from denial of summary judgment in the bank's equitable action to reform a mortgage note did not supersede the trial court's authority to enter an order requiring mortgagors to pay mortgage payments into the court registry. *Decatur Fed. Savs. & Loan v. Gibson*, 268 Ga. 362, 489 S.E.2d 820 (1997).

Dismissal of an appeal in a probate matter was proper because the VA guardian's filing of a notice of appeal relating to the probate court's order dismissing the notice of appeal, did not divest the probate court of jurisdiction to complete the hearing and issue an order compelling the guardian to pay the value of the estate to the administrator of the estate; the record showed that the guardian did not pay the court costs associated with the dismissal order appeal until after the court entered the order that the guardian pay over the value of the estate. *In re Estate of Robertson*, 271 Ga. App. 785, 611 S.E.2d 680 (2005).

Probate court's order granting an executor's motion for payment of expenses of probate pursuant to O.C.G.A. § 53-5-26 was not prohibited by the supersedeas imposed by the filing of the initial notice of appeal because the order permitted the executor to have the estate pay expenses, including reasonable attorney's fees, incurred by the executor in the probate of the will and while acting in good faith, and it was neither based upon nor related to the carrying into effect the judgment on appeal. *Simmons v. Harms*, 287 Ga. 176, 695 S.E.2d 38 (2010).

Effect of Supersedeas

Effect of appeal on enforcement of judgment superseded.

Appeal in a separate action involving the tenant only did not affect the tenant's guarantors, nor a judgment entered solely against them. *Winzer v. EHCA Dunwoody, LLC*, 277 Ga. App. 710, 627 S.E.2d 426 (2006).

Modification of judgment.

Trial court erred in vacating an order which removed an executor as the executor of an estate and in entering a second order which again removed the executor; O.C.G.A. § 5-6-46(a) provided that the filing of a notice of appeal served as supersedeas when all costs in the trial court are paid, and this automatic supersedeas deprived the trial court of jurisdiction to modify or alter the judgment in the case pending the appeal, and because an appeal of the first order was pending when the second order was entered, any subsequent proceedings purporting to supplement, amend, alter or modify the judgment, whether pursuant to statutory or inherent power, was without effect. *In re Estate of Zeigler*, 259 Ga. App. 807, 578 S.E.2d 519 (2003).

Trial court correcting mistakes in judgment, etc.

In accord with *Brown v. Wilson Chevrolet-Olds, Inc.* See *Screven v. Drs. Gruskin & Lucas*, 227 Ga. App. 756, 490 S.E.2d 422 (1997).

Trial court's modification of orders and jury trial were nullity. — In a title insurance case, the trial court erred in modifying the court's summary judgment orders and proceeding to trial after the insurer filed a notice of appeal from the original summary judgment order. Under O.C.G.A. § 5-6-46(a), the insurer's notice of appeal deprived the trial court of jurisdiction, and the subsequent orders, trial, and jury verdict were a nullity. *Lawyers Title Ins. Corp. v. Griffin*, 302 Ga. App. 726, 691 S.E.2d 633 (2010).

Plaintiff's supersedeas protection divested allowing jurisdiction in trial court. — Although the filing of a mortgagor's notice of appeal from an order granting a writ of possession over foreclosed property to the mortgagee should have operated as a supersedeas, pursuant to O.C.G.A. § 5-6-46, upon either the payment of all costs in the trial court or an affidavit of indigency, where the mortgagor failed to pay the costs and the mortgagor's affidavit of indigency was found to be either frivolous or a fabrication, the mortgagor's supersedeas protection was divested; accordingly, the trial court still retained jurisdiction over the

matter. *Hurt v. Norwest Mortg., Inc.*, 260 Ga. App. 651, 580 S.E.2d 580 (2003).

Supersedeas Bond

Authority to require bond. — Trial court did not err in requiring a supersedeas bond because O.C.G.A. § 5-6-46(a) authorizes a court to rule on such motions, even though filed after the notice of appeal is filed and after the appeal is docketed in the appellate court. *Ruffin v. Banks*, 249 Ga. App. 297, 548 S.E.2d 61 (2001), overruled on other grounds, *Kent v. Kent*, 289 Ga. 821, 716 S.E.2d 212 (2011).

A trial court has no discretion under O.C.G.A. § 5-6-46 to refuse to require a supersedeas bond posted for the benefit of an appellee who seeks security for a money judgment, nor to do so without a hearing. *Barngrover v. Hins*, 289 Ga. App. 410, 657 S.E.2d 14 (2008).

Where final judgment was entered against the issuer based on a supersedeas bond, and the judgment was not challenged or otherwise modified, vacated, or set aside, the issuer could not go behind the judgment, as a defendant in *feri facias*, and attack the validity of the bond. *Riverdale Collision, Inc. v. Osborne Bonding & Sur. Co.*, 220 Ga. App. 611, 469 S.E.2d 823 (1996).

Trial court erred by denying the plaintiff's motion for a supersedeas bond after plaintiff successfully obtained a jury verdict against the defendants; the plaintiff exercised the statutory right to move the trial court for a supersedeas bond and was under no obligation either to ask for a hearing or to show that the defendants were incapable of satisfying the judgment against them. The trial court was obligated to require the defendants to post a supersedeas bond in the full amount of the judgment, including costs, interest, and damages, unless, after

notice and hearing, it found good cause for fixing a lesser amount. *Barngrover v. Hins*, 289 Ga. App. 410, 657 S.E.2d 14 (2008).

Trial court erred in denying a broker's motion for a supersedeas bond because having received a judgment for the recovery of money against the sellers, the broker exercised the broker's statutory right to move for a supersedeas bond, and under O.C.G.A. § 5-6-46(a), the trial court was obligated to require the sellers to post a supersedeas bond in the full amount of the judgment including costs, interest, and damages, unless, after notice and hearing, the court found good cause for fixing a lesser amount. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

No abuse of discretion found as to amount of bond.

In a probate proceedings in which the executrix was dismissed as executrix after failing to gain control of the assets of the estate, including a diamond ring and the decedent's van, and the executrix sold the decedent's home without obtaining an appraisal and without attempting to realize the best price on the open market, the trial court did not abuse its discretion under O.C.G.A. § 5-6-46 in requiring the executrix to post a supersedeas bond in the amount of \$95,500; the contested values of the decedent's home, the amount of executor's fees, and the lack of any valuation as to the household furnishings, the diamond ring, and the van justified the amount of the bond. In *re Estate of Zeigler*, 273 Ga. App. 269, 614 S.E.2d 799 (2005).

Order to post bond upheld. — When a case presented mixed questions of equity and law, and the trial court's final order enforced a contract, the trial court did not err when it the posting of a supersedeas bond. *Ruskin v. AAF-McQuay, Inc.*, 284 Ga. App. 49, 643 S.E.2d 333 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 262.

5-6-47. Operation of notice of appeal and affidavit of indigence as supersedeas in civil cases; procedure for contests as to truth of affidavit.

JUDICIAL DECISIONS

Finding that party not indigent not reviewable.

In a breach of contract suit brought by an oncologist against a corporation, the corporation's failure to submit an opposing affidavit to the oncologist's pauper's affidavit did not alter the fact that the trial court's findings regarding the oncologist's indigency were not subject to appellate review. Under O.C.G.A. §§ 5-6-47(b) and 9-15-2(a)(2), a trial court's ruling regarding indigency was final and not subject to appellate review; the proper forum for determining the truth of a pauper's affidavit was in the trial court. *Mitchell v. Cancer Carepoint, Inc.*, 299 Ga. App. 881, 683 S.E.2d 923 (2009).

Emergency motion for supersedeas required. — Claim that a tenant's notice of appeal and affidavit of poverty did not act as a supersedeas of an order issuing a landlord a writ of possession was rejected as it was not a matter reflected in the appellate record and was something that should be handled by an emergency motion for supersedeas; further, the tenant

did not file an enumeration of errors and brief and no extension had been requested or granted. *Hughley v. Habra*, 277 Ga. App. 138, 625 S.E.2d 531 (2006).

Error to dismiss appeal. — Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was in error as to two of the children who filed affidavits of indigency; assuming the children filed true affidavits of indigence (O.C.G.A. § 9-15-2(a)(2), (b)), the children had rights to appeal from the dismissal of the children's proportionate shares of the wrongful death case as: (1) the wrongful death claim was not jointly in all the children or in none of the children; and (2) originally, each child had a separate claim for one-fourth of the value of the decedent's life. *Mapp v. We Care Transp. Servs.*, No. A11A1986; No. A11A1987, 2012 Ga. App. LEXIS 107 (Feb. 6, 2012).

Cited in *Plumides v. American Engines & Transmissions, Inc.*, 227 Ga. App. 885, 490 S.E.2d 552 (1997).

5-6-48. Grounds for dismissal of appeal; amendments; correcting or supplementing record or transcript; effect of dismissal of appeal upon cross appeal; effect of deficiencies upon consideration of appeal.

(a) Failure of any party to perfect service of any notice or other paper hereunder shall not work dismissal; but the trial and appellate courts shall at any stage of the proceeding require that parties be served in such manner as will permit a just and expeditious determination of the appeal and shall, when necessary, grant such continuance as may be required under the circumstances.

(b) No appeal shall be dismissed or its validity affected for any cause nor shall consideration of any enumerated error be refused, except:

(1) For failure to file notice of appeal within the time required as provided in this article or within any extension of time granted hereunder;

- (2) Where the decision or judgment is not then appealable; or
- (3) Where the questions presented have become moot.

(c) No appeal shall be dismissed by the appellate court nor consideration of any error therein refused because of failure of any party to cause the transcript of evidence and proceedings to be filed within the time allowed by law or order of court; but the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party. In like manner, the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that the delay was inexcusable and was caused by the failure of a party to pay costs in the trial court or file an affidavit of indigence; provided, however, that no appeal shall be dismissed for failure to pay costs if costs are paid within 20 days (exclusive of Saturdays, Sundays, and legal holidays) of receipt by the appellant of notice, mailed by registered or certified mail or statutory overnight delivery, of the amount of costs.

(d) At any stage of the proceedings, either before or after argument, the court shall by order, either with or without motion, provide for all necessary amendments, require the trial court to make corrections in the record or transcript or certify what transpired below which does not appear from the record on appeal, require that additional portions of the record or transcript of proceedings be sent up, or require that a complete transcript of evidence and proceedings be prepared and sent up, or take any other action to perfect the appeal and record so that the appellate court can and will pass upon the appeal and not dismiss it. If an error appears in the notice of appeal, the court shall allow the notice of appeal to be amended at any time prior to judgment to perfect the appeal so that the appellate court can and will pass upon the appeal and not dismiss it.

(e) Dismissal of the appeal shall not affect the validity of the cross appeal where notice therefor has been filed within the time required for cross appeals and where the appellee would still stand to receive benefit or advantage by a decision of his cross appeal.

(f) Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding that the notice of appeal fails to specify definitely the judgment appealed from or that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed. An appeal shall not be dismissed nor consideration thereof refused because of

failure of the court reporter to file the transcript of evidence and proceedings within the time allowed by law or order of court unless it affirmatively appears from the record that the failure was caused by the appellant. (Ga. L. 1965, p. 18, § 13; Ga. L. 1965, p. 240, § 1; Ga. L. 1966, p. 493, § 10; Ga. L. 1968, p. 1072, §§ 2, 3; Ga. L. 1972, p. 624, § 1; Ga. L. 1978, p. 1986, § 1; Ga. L. 2000, p. 1589, § 3.)

The 2000 amendment, effective July 1, 2000, substituted “certified mail or statutory overnight delivery” for “certified mail” in the last sentence of subsection (c).

Editor’s notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For article, “Appellate Practice and Procedure,” see 63 Mercer L. Rev. 67 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FAILURE TO PERFECT SERVICE

MANDATORY DISMISSAL OF APPEAL

1. IN GENERAL
2. FAILURE TO TIMELY FILE NOTICE OF APPEAL
3. APPEALS FROM NONFINAL JUDGMENTS
4. MOOT QUESTIONS

DELAY IN FILING TRANSCRIPT

1. IN GENERAL
2. UNREASONABLE, INEXCUSABLE DELAY

DELAY OCCASIONED BY NONPAYMENT OF COSTS

1. IN GENERAL
2. UNREASONABLE, INEXCUSABLE DELAY

AMENDMENT OF RECORD

NOTICE OF APPEAL

APPLICATION GENERALLY

General Consideration

Appellate courts should reach merits of appeals where possible.

Where the plaintiff failed to file enumerations of error as a separate document, but did set forth enumerations of error in her brief, it was apparent from the notice of appeal, the brief, the enumerations of error in that brief, and the record, exactly what judgment was appealed from and what errors were asserted, and a liberal construction of the appellate practice act required the court to exercise its discretion to reach the merits of the case. *Leslie v. Williams*, 235 Ga. App. 657, 510 S.E.2d 130 (1998).

Section does not limit judicial authority under rule regarding dismissal.

Belated filing of separate enumerations of error is not a basis for dismissal of an appeal. *Reeder v. GMAC*, 235 Ga. App. 617, 510 S.E.2d 337 (1998).

Effect of dismissal on cross-appeal.

Where the main appeal was dismissed in its entirety and the defendant filed no application for interlocutory review of the denial of the motion to transfer venue, the court had no independent jurisdiction over the cross-appeal and dismissal is proper. *Patel v. Georgia Power Co.*, 234 Ga. App. 141, 505 S.E.2d 787 (1998).

Cited in *Copeland v. Continental*

Kewitt, 218 Ga. App. 305, 461 S.E.2d 277 (1995); State v. Bishop, 219 Ga. App. 510, 466 S.E.2d 8 (1995); Howard v. City of Columbus, 219 Ga. App. 569, 466 S.E.2d 51 (1995); Richardson v. GMC, 221 Ga. App. 583, 472 S.E.2d 143 (1996); Plumides v. American Engines & Transmissions, Inc., 227 Ga. App. 885, 490 S.E.2d 552 (1997); Goldstein v. Goldstein, 229 Ga. App. 862, 494 S.E.2d 745 (1997); Hopkinson v. Labovitz, 231 Ga. App. 557, 499 S.E.2d 338 (1998); Central of Ga. R.R. v. DEC Assocs., 231 Ga. App. 787, 501 S.E.2d 6 (1998); Hipple v. Simpson Paper Co., 234 Ga. App. 516, 507 S.E.2d 156 (1998); Adams v. State, 234 Ga. App. 696, 507 S.E.2d 538 (1998); Hawkins ex rel. Pearson v. Small World Day Care Ctr., Inc., 234 Ga. App. 843, 508 S.E.2d 200 (1998); Durden v. Griffin, 270 Ga. 293, 509 S.E.2d 54 (1998); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); Pinnell v. Kight, 245 Ga. App. 299, 537 S.E.2d 170 (2000); Camp v. Eichelkraut, 246 Ga. App. 275, 539 S.E.2d 588 (2000); McKinney v. Jennings, 246 Ga. App. 862, 542 S.E.2d 580 (2000); Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 555 S.E.2d 175 (2001); Lott v. Arrington & Hollowell, P.C., 258 Ga. App. 51, 572 S.E.2d 664 (2002); Ball v. Fulton-DeKalb Hosp. Auth., 258 Ga. App. 899, 576 S.E.2d 1 (2002); Ford Motor Co. v. Lawrence, 279 Ga. 284, 612 S.E.2d 301 (2005); Bailey v. McNealy, 277 Ga. App. 848, 627 S.E.2d 893 (2006); Randolph County v. Johnson, 282 Ga. 160, 646 S.E.2d 261 (2007); Sistrunk v. State, 287 Ga. App. 39, 651 S.E.2d 350 (2007); Blair v. Bishop, 290 Ga. App. 721, 660 S.E.2d 35 (2008); Hiner Transp., Inc. v. Jeter, 293 Ga. App. 704, 667 S.E.2d 919 (2008); Lee v. Ga. Power Co., 296 Ga. App. 719, 675 S.E.2d 465 (2009).

Failure to Perfect Service

Hearing.

In a contract action, the trial court did not err in denying plaintiff's motion for an extension of time, as plaintiff failed to timely file a trial transcript, and because the motion was improperly filed, plaintiff was not entitled to an evidentiary hearing. Hadavi v. Palmer, 260 Ga. App. 509, 580 S.E.2d 291 (2003).

Mandatory Dismissal of Appeal

1. In General

Dismissal of cross-appeal required since cross-appeal had no independent basis for jurisdiction. — Georgia Department of Transportation's (DOT's) cross-appeal was dismissed with regard to a trial court's grant of an asphalt company's motions in limine and the denial of the DOT's partial motion for summary judgment since the asphalt company's direct appeal was dismissed for failure to file a brief and enumerations of error, therefore, the cross-appeal could not survive on its own under O.C.G.A. § 5-6-48. The DOT never applied for interlocutory review of the rulings of the trial court it was challenging, therefore, the appellate court had no independent basis for jurisdiction over the cross-appeal. State, DOT v. Douglas Asphalt Co., 297 Ga. App. 511, 677 S.E.2d 728 (2009).

2. Failure to Timely File Notice of Appeal

Failure to file notice of appeal within time required, etc.

Judgment complained of by parents was a trial court's finding that the parents' children were deprived pursuant to O.C.G.A. § 15-11-2(8)(A), and not a later order ruling that the case was closed; the parents' notice of appeal filed more than three months after the order finding deprivation was untimely, and the appeal was dismissed. In the Interest of I.S., 265 Ga. App. 759, 595 S.E.2d 528 (2004).

Inexcusable and unreasonable delay, etc.

In accord with Johnson v. Georgia Pub. Serv. Comm'n. See Lindstrom v. Forsyth County, 221 Ga. App. 581, 472 S.E.2d 106 (1996).

Because a limited liability company (LLC) failed to offer an explanation as to why it did not hire an attorney, obtain the transcript or take any other steps to pursue its appeal for over two and one-half years, the trial court did not abuse its discretion in dismissing the appeal, as the lengthy delay was unreasonable, inexcusable and caused by the LLC. Winzer v. EHCA Dunwoody, LLC, 277 Ga. App. 710, 627 S.E.2d 426 (2006).

3. Appeals From Nonfinal Judgments

Dismissal proper where judgment appealed is neither final nor certified, etc.

Appeal taken from two orders that appeared to be non-final, was dismissed; moreover, as no certificate of immediate review was obtained, and since no amendment was filed to correct the defect in the notice of appeal, no other recourse remained. *Southwest Health & Wellness, LLC v. Work*, 282 Ga. App. 619, 639 S.E.2d 570 (2006).

4. Moot Questions

Motion to dismiss as moot an appeal of the entry of summary judgment. — College's motion to dismiss as moot a Baptist convention's appeal of the entry of summary judgment for the college as to the convention's request for an injunction barring the college from dissolving was denied as the trial court's order dissolving a temporary restraining order was entered the day before the college filed articles of dissolution with the Georgia Secretary of State, the certificate of dissolution was entered nunc pro tunc, and the convention's counsel received the order on the date the certificate was effective; thus, the convention did not have notice to require it to obtain a supersedeas. *Baptist Convention v. Shorter College*, 266 Ga. App. 312, 596 S.E.2d 761 (2004), *aff'd*, 279 Ga. 466, 614 S.E.2d 37 (2005).

Ex-employer's motion to dismiss on appeal moot. — Trial court granted the employee leave to amend the answer to include a claim for wrongful restraint, which remained pending below, and thus, the appellate court had to decide whether the restrictive covenant actually enforced against the employee was illegal; if the restrictive covenant was, then the employee's wrongful restraint claim was meritorious, and the employee could recover such costs and damages, *O.C.G.A. § 9-11-65(c)*, as the employee may have suffered during the period of the injunction's enforcement. Therefore, the ex-employer's motion to dismiss the appeal as moot under *O.C.G.A. § 5-6-48(b)(3)* was denied. *Cox v. Altus*

Healthcare & Hospice, Inc., 308 Ga. App. 28, 706 S.E.2d 660 (2011).

Trial court without discretion to rule on moot question. — Where a father petitioned to have his name removed from the child abuse registry and challenged the constitutionality of the statute establishing the registry, and the trial court expunged the father's name as he requested, the trial court had no discretion to rule on the constitutional question and did not err in declaring the constitutional challenge moot. *In re I.B.*, 219 Ga. App. 268, 464 S.E.2d 865 (1995).

Appeal deemed moot and dismissed. — See *Computone Corp. v. Branch, Pike & Ganz*, 264 Ga. 844, 452 S.E.2d 114 (1995); *Rohm & Haas Co. v. Gainesville Paint & Supply Co.*, 225 Ga. App. 441, 483 S.E.2d 888 (1997); *Federal Nat'l Mtg. Ass'n v. DeMoonie*, 231 Ga. App. 162, 497 S.E.2d 677 (1998); *Good Ol' Days Commissary, Inc. v. Longcrier Family Ltd. Partnership I*, 240 Ga. App. 111, 522 S.E.2d 249 (1999).

Because defendant failed to file a timely direct appeal of the denial of defendant's request for appellate counsel, defendant was precluded from raising the same issue again; further, defendant had withdrawn from the appellate court the record from defendant's original appeal, and therefore the appellate court did not know whether defendant attempted to raise the issue of appellate counsel during defendant's initial appeal; as the initial appeal had been decided, the issue was moot under *O.C.G.A. § 5-6-48(b)(3)*. *Spear v. State*, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Since a debtor had taken a direct appeal in a separate case on the dismissal of the debtor's application to appeal an order substituting a party plaintiff, any error upon the dismissal of the debtor's application for interlocutory review was moot. *Kent v. A.O. White, Jr., Consulting Eng'r, Inc.*, 279 Ga. App. 563, 631 S.E.2d 782 (2006).

As a homeowner last operated a haunted house on the homeowner's property on October 31, 2007, a city's attempt to enjoin the activity was moot, and dismissal was appropriate under *O.C.G.A. § 5-6-48(b)*. *City of Comer v. Seymour*, 283 Ga. 536, 661 S.E.2d 539 (2008).

Patients' appeal of a judgment entered against the patients in a medical malpractice action on the ground that it was error to grant a motion to transfer filed by a hospital and corporation pursuant to the forum non conveniens statute, O.C.G.A. § 9-10-31.1, was dismissed as moot because the patients admitted in their appellate brief that their case had already been adjudicated, and it was too late for the patients to obtain an adjudication of their case in the Fulton County Superior Court; therefore, any determination by the court of appeals regarding whether the Fulton County Superior Court was authorized under the forum non conveniens statute to transfer their case to Cobb County Superior Court for adjudication would be an abstract exercise unrelated to any existing facts or rights. *Lamb v. Javed*, No. A09A2234, 2010 Ga. App. LEXIS 44 (Jan. 19, 2010).

Where appeal was based on action taken pursuant to statute later declared unconstitutional, the question of abuse of discretion under the statute was moot; thus, dismissal of the appeal upon the court's own motion was proper and there could be no cross-appeal. *Bergmann v. McCullough*, 218 Ga. App. 353, 461 S.E.2d 544 (1995), cert. denied, 517 U.S. 1141, 116 S. Ct. 1433, 134 L. Ed. 2d 555 (1996).

Mortgagor's appeal from a writ of possession, which was granted in favor of the mortgagee after the mortgagor's property was foreclosed upon and the mortgagor refused to surrender possession, was dismissed pursuant to O.C.G.A. § 5-6-48(b)(3) because the parties had entered into a consent agreement with respect to the writ of possession and, accordingly, the matter was moot; it was noted that pursuant to the consent judgment which embodied the agreement, the mortgagor had agreed to withdraw the mortgagor's pending appeal. *Hurt v. Norwest Mortg., Inc.*, 260 Ga. App. 651, 580 S.E.2d 580 (2003).

Acceptance of an attorney's fees payment by plaintiff did not render an appeal moot because there was an inference that it was accepted as a partial payment and because the attorney fees issue was collateral to the main judgment

appealed. *Claxton Enter. v. Evans County Bd. of Comm'rs*, 249 Ga. App. 870, 549 S.E.2d 830 (2001).

Annexation challenge rendered moot by city's annexation of additional property. — Taxpayer's challenge to a city's 2007 annexation of property based on the creation of an illegal unincorporated island within the new municipal boundaries, in violation of O.C.G.A. § 36-36-4, was moot under O.C.G.A. § 5-6-48(b)(3) because the city later remedied the violation by also annexing the unincorporated island. *Scarborough Group v. Worley*, 290 Ga. 234, 719 S.E.2d 430 (2011).

Appeal of denial of nomination petition was moot. — Regardless of the merits or lack thereof of the candidate's claims that the candidate's nomination petition was miscounted, improperly counted, or that there were irregularities in the process leading to the unlawful decision to keep the candidate off the November ballot, the candidate's present appeal was moot because the general election had already taken place. *Bodkin v. Bolia*, 285 Ga. 758, 684 S.E.2d 241 (2009).

Delay in Filing Transcript

1. In General

Transcript not required for appellate review. — Although a petroleum company did not obtain a transcript of the trial court's hearing on a bank's motion to dismiss the company's action in a timely manner and a transcript could not be obtained as a result, the appellate court found that it did not need the transcript to rule on the company's appeal, and it upheld the trial court's judgment denying the bank's motion to dismiss the company's appeal. *Griffis v. Branch Banking & Trust Co.*, 268 Ga. App. 588, 602 S.E.2d 307 (2004).

Failure to include transcript of hearing on motion to dismiss appeal. — Because a broker failed to include a transcript of the hearing on the broker's motion to dismiss sellers' appeal, specifying in the broker's notice of appeal that a transcript of evidence and proceedings of the hearing would not be filed for inclusion in the record on appeal, the court of

appeals had to assume the trial court's ruling denying the motion was correct. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Determination of whether delay was unreasonable or inexcusable required. — Trial court, in reaching a decision whether a delay in filing a transcript justified dismissal of the appeal, had to consider whether the delay was unreasonable and inexcusable. *Russell Morgan Landscape Mgt. v. Velez-Ochoa*, 252 Ga. App. 549, 556 S.E.2d 827 (2001).

Trial court erred in denying a motion to dismiss a patient's appeal for failure to timely pay the bill of costs as required by O.C.G.A. § 5-6-48(c) because the trial court did not determine the length of the delay, the reasons for the delay, whether the patient caused the delay, and whether the delay was inexcusable; the trial court merely entered a summary order denying the motion to dismiss and relied exclusively upon the arguments and uncorroborated averments contained in the patient's responsive brief, and as a result, the court of appeals was unable to engage in meaningful appellate review of whether the trial court properly exercised the court's discretion in denying the motion to dismiss the appeal. *Grant v. Kooby*, 310 Ga. App. 483, 713 S.E.2d 685 (2011).

Unreasonable distinguished from inexcusable. — The question of whether a delay in filing a transcript is unreasonable is a separate matter from the issue of whether such a delay is inexcusable and refers principally to the length and effect of the delay rather than the cause of the delay. *Cook v. McNamee*, 223 Ga. App. 460, 477 S.E.2d 884 (1996).

When clerk is unable to timely transmit record. — Although a court clerk's certificate under O.C.G.A. § 5-6-43 that was attached to a record on appeal indicated that the delay in the transmission of the record was not due to any fault by the insurer that had appealed, as the certificate was dated months after the trial court dismissed an earlier appeal under O.C.G.A. § 5-6-48(c), it was clearly not considered by the trial court in the court's dismissal decision, and accordingly, it was not considered by the appellate court on appeal from the dismissal.

ACCC Ins. Co. v. Pizza Hut of Am., Inc., No. A11A1905, 2012 Ga. App. LEXIS 127 (Feb. 10, 2012).

Absent transcript, trial court findings assumed authorized.

Trial court did not abuse the court's discretion by dismissing a security corporation's appeal of a civil judgment against the corporation as a result of having failed to have filed a transcript within 30 days as required by O.C.G.A. § 5-6-42. Since no transcript existed, the appellate court was unable to determine whether the security corporation had rebutted the presumption that the filing of the transcript 49 days after the 30-day statutory deadline for filing transcripts was unreasonable and no extension was requested. *Pioneer Sec. & Investigations, Inc. v. Hyatt Corp.*, 295 Ga. App. 261, 671 S.E.2d 266 (2008).

2. Unreasonable, Inexcusable Delay

Finding of unreasonable and inexcusable delay required for dismissal, etc.

With regard to delays in transmitting an appeal record to the appellate court, a trial court may dismiss an appeal where the delay was unreasonable, inexcusable, and caused by the failure of a party to pay costs in the trial court or file an affidavit of indigence. *Hameed v. Hall*, 234 Ga. App. 890, 508 S.E.2d 680 (1998).

In accord with *Baker v. Southern Ry. See Burns v. Howard*, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

Trial court's failure to make findings with regard to the reasonableness and excusability of the delay, as well as on the issue of causation, mandates a reversal of its dismissal order and a remand with direction that findings of fact be entered on these issues. *Wood v. Notte*, 238 Ga. App. 748, 519 S.E.2d 923 (1999).

Trial court's order dismissing appeal for the failure to file the transcript was affirmed where the evidence showed: (1) that although the transcript was completed sometime in late September or early October, appellant failed to have it filed by November 13 as ordered by the court; (2) that the delay was due to appellant's own failure to timely pay the court reporter; and (3) that the delay was inexcusable as appellant sought the third ex-

tension of time on the ground that the court reporter needed more time to prepare the transcript, accepting no responsibility for, and making no mention of, appellant's own failure to pay the court reporter the balance due. *Quarles v. Saddleback Ridge Condos. Ass'n*, 266 Ga. App. 467, 597 S.E.2d 460 (2004).

Trial court did not abuse its discretion in granting a dismissal of the plaintiff's appeal, pursuant to O.C.G.A. § 5-6-42, because the plaintiff failed to file a transcript for the plaintiff's appeal for more than 17 months after the plaintiff filed the notice of appeal, the plaintiff never sought an extension of time for such filing under O.C.G.A. § 5-6-39, and the court held that the plaintiff's action was unreasonable, inexcusable, and caused by the plaintiff's own conduct; there was no requirement that a hearing be held on the motion to dismiss, pursuant to O.C.G.A. § 5-6-48(c), as the plaintiff was only entitled to an opportunity to be heard, which the plaintiff received. *Lemmons v. Newton*, 269 Ga. App. 880, 605 S.E.2d 626 (2004).

Appeal was properly dismissed for failure to timely file a transcript under O.C.G.A. § 5-6-42 since the 150 day delay in filing the transcript was unreasonable under O.C.G.A. § 5-6-48, in that it resulted in a delay of the consideration of the appeal for another term and affected the appellee's ability to administer the estate in question; the delay was inexcusable since the record indicated that the attorney had the transcript when the attorney filed the notice of appeal. *Adams v. Hebert*, 279 Ga. App. 158, 630 S.E.2d 652 (2006).

Inexcusable delay in failing to file transcript. — Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. *Dye v. U.S. Bank Nat'l Ass'n*, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Since a construction company bringing an appeal of a jury verdict in favor of homeowners never sought an extension of

time to file the transcript from the post-trial hearing on its motions for new trial and judgment notwithstanding the verdict, nor communicated with the court reporter during the nine-month period after the hearing, the record did not support the trial court's finding that the delay in filing that transcript caused by the construction company was excusable and the trial court's denial of the homeowners' motion to dismiss the appeal was error; the record showed that the construction company's actions delayed a just disposition of the case by delaying the docketing of the appeal and hearing of the case by the appellate court, and, consequently, the homeowners were forced to wait for a final disposition on the construction company's appeal of the verdict against it. *Coptic Constr. Co. v. Rolle*, 279 Ga. App. 454, 631 S.E.2d 475 (2006).

Trial court did not abuse the court's discretion in dismissing parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parent's delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed their notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. *Bush v. Reed*, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion in finding that a mother's failure to timely pursue the filing of the transcript from the mother's parental rights termination hearing or seek an extension of time for almost one year was unreasonable and inexcusable and in dismissing the appeal under O.C.G.A. § 5-6-48(a). In *the Interest of T.H.*, 311 Ga. App. 641, 716 S.E.2d 724 (2011).

While good faith is a factor in determining whether conduct is inexcusable or excusable, it is but one factor to be consid-

ered; existence of good faith does not automatically render an unreasonable delay excusable; whether conduct is incapable of being justified and thus inexcusable must be determined by examining the totality of the circumstances of a given appeal and, among the factors which should be considered is the existence of negligence on the part of the appealing party causing unreasonable delay, whether such delay reasonably should have been detected and timely corrected, and whether any such negligence was so severe as to prejudice the opposing party or to cause the appeal to become stale. *Jackson v. Beech Aircraft Corp.*, 217 Ga. App. 498, 458 S.E.2d 377 (1995).

Specific findings of unreasonable and unexcusable delay.

Delay of nine months after the notice of appeal was filed and the total failure to pay the cost of the transcript as of the date of the trial court's order was both inexcusable and unreasonable. *Kendall v. Burke*, 237 Ga. App. 742, 516 S.E.2d 791 (1999).

But court not required to make express finding that delay was inexcusable. — Since no requirement exists that the trial court make specific recitals of the elements necessary to authorize dismissal, the presumption should adhere as in other appeals that the judgment was correct, with the burden upon appellant to show otherwise to the reviewing court. *Cooper v. State*, 235 Ga. App. 66, 508 S.E.2d 447 (1998).

Where delay is attributable to clerk, etc.

Appeal was timely as the notice of appeal was filed within 30 days after entry of an appealable judgment as required by O.C.G.A. § 5-6-38(a); although the court reporter inexplicably did not file the transcript with the court until two years later, defendant did not cause an unreasonable and inexcusable delay in filing the appeal. *Johnson v. State*, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

Dismissal not warranted where, etc.

Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the

trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. *Fulton County Bd. of Tax Assessors v. Love*, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

151-day delay unreasonable.

The trial court erred in not granting appellee's motion to reconsider the denial of their motion to dismiss where appellant's obvious shirking of the responsibility for seeing to it that a transcript of proceedings of their medical malpractice case was filed in the trial court and that shirking of responsibility led to a greater than three-year delay in filing the transcript that prejudiced the surgical business and the doctor. *Atlanta Orthopedic Surgeons v. Adams*, 254 Ga. App. 532, 562 S.E.2d 818 (2002).

Delay held unreasonable, etc.

Delay of almost two years in filing transcript warranted dismissal of appeals. *Boveland v. YWCA*, 227 Ga. App. 241, 489 S.E.2d 35 (1997).

Transcript filing delay of more than six months was unreasonable. *Bass v. Mercer*, 240 Ga. App. 545, 524 S.E.2d 260 (1999).

Trial court did not abuse its discretion in dismissing the defendant's notice of appeal due to the defendant's unreasonable and inexcusable delay in transmitting the record to the appellate court since defendant waited 108 days before transmitting the record, waited three months to pay court costs, and was represented by counsel. *Strickland v. State*, 257 Ga. App. 304, 570 S.E.2d 713 (2002).

Because a lender's O.C.G.A. § 9-11-41(a)(1)(A) notice to withdraw an appeal after sustaining an adverse judgment on the merits did not toll the time in which the lender was required to file a transcript on appeal, the renewal statute, O.C.G.A. § 9-2-61, did not apply; thus, the appeal was properly dismissed pursuant to O.C.G.A. § 5-6-48(c). *Schreck v. Standridge*, 273 Ga. App. 58, 614 S.E.2d 185 (2005).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48, that the appellant's delay in filing a transcript was unreasonable and inexcusable, and that the delay in the appeal

process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, and at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. *Lavalle v. Jarrett*, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Delay was not unreasonable or inexcusable. — Trial court did not err in finding claimant's 91 day delay in paying costs was not unreasonable nor inexcusable where the court conducted an evidentiary hearing and the claimant suffered from both financial and mental disability. *Logan v. St. Joseph Hosp.*, 227 Ga. App. 853, 490 S.E.2d 483 (1997).

Trial court did not abuse its discretion in denying appellee's motion to dismiss an appeal because of appellant's late filing of a transcript since the evidence showed that the delay was excusable, attributable to a third party, and did not directly prejudice the appellee. *Brandenburg v. All-Fleet Refinishing, Inc.*, 252 Ga. App. 40, 555 S.E.2d 508 (2001).

Trial court did not abuse the court's discretion, pursuant to O.C.G.A. § 5-6-48(c), in granting the appellee's motion to dismiss with regard to the transcript on appeal because the appellants' delay in filing the transcript, pursuant to O.C.G.A. §§ 5-6-41(c) and 5-6-42, was unreasonable, inexcusable, and caused by the appellants. *Pistacchio v. Frasso*, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Delay Occasioned by Nonpayment of Costs

1. In General

Nonprejudicial delay.

Trial court properly denied appellee's motion to dismiss an appeal for appel-

lant's unreasonable delay in the payment of costs, where the delay was caused by confusion surrounding the post-trial appellate procedure and was neither unreasonable nor inexcusable, and appellant showed no prejudice from the delay. *DOT v. Southeast Timberlands, Inc.*, 263 Ga. App. 805, 589 S.E.2d 575 (2003).

Trial court properly found that a delay in paying costs was excusable considering the pendency of the motion to accept a pauper's affidavit; because the opposing party failed to show any prejudice resulting from the delay, and given that the trial court had broad discretion in this area, the trial court's judgment was affirmed. *Hiers v. ChoicePoint Servs.*, 270 Ga. App. 128, 606 S.E.2d 29 (2004).

Discretion of court. — Whether to dismiss a notice of appeal for delay in paying costs rested in the sound discretion of the trial court when the grounds to dismiss were met. *Style Craft Homes, Inc. v. Chapman*, 226 Ga. App. 634, 487 S.E.2d 32 (1997).

Dismissal of state's appeal under O.C.G.A. § 5-6-48(c) upheld. — The trial court properly dismissed the state's appeal from an order barring the defendant's trial on speedy trial grounds, pursuant to O.C.G.A. § 5-6-48(c), as order was not the type the state had a right to pursue under O.C.G.A. § 5-7-1; moreover, the order was not void, as it was entered by a court of competent jurisdiction. *State v. Glover*, 281 Ga. 633, 641 S.E.2d 543 (2007).

Trial court did not abuse its discretion in dismissing defendant's notice of appeal where the defendant had failed to request a hearing within 15 days of the court's order dismissing the appeal for failure of defendant to pay the cost bill. *Ledee v. Kissiah*, 215 Ga. App. 850, 452 S.E.2d 558 (1994).

2. Unreasonable, Inexcusable Delay

Unreasonable delay warrants dismissal.

Court properly dismissed the plaintiff's appeal after plaintiff failed to appear and present evidence at an indigency hearing and failed to pay the costs of the appeal within the statutory time limit. *Cody v.*

Coldwell Banker Real Estate Corp., 253 Ga. App. 752, 560 S.E.2d 275 (2002).

Because an unsuccessful Georgia Bar applicant, who sought review of a trial court's denial of a petition for mandamus, failed to pay the bill of costs for the appellate record, despite filing numerous notices of appeal, receiving updated bills, and receiving extensions of time to pay the bill, a trial court properly found the delay of over two years was both inexcusable and unreasonable under O.C.G.A. § 5-6-48(c), and dismissal of the appeal was properly granted. *Cottrell v. Askew*, 276 Ga. App. 717, 624 S.E.2d 203 (2005).

Notice of appeal filed by several related companies in an action under O.C.G.A. § 14-2-1604 was properly dismissed for failure to timely pay a bill of costs pursuant to O.C.G.A. § 5-6-48(c) as the 64-day delay in paying was due to counsel's failure to confirm that payment had been made; thus, the delay was inexcusable and unreasonable. *Langdale Co. v. Langdale*, 295 Ga. App. 372, 671 S.E.2d 863 (2008).

Trial court did not abuse the court's discretion when the court dismissed an insurer's appeal under O.C.G.A. § 5-6-48(c) as the insurer did not rebut the presumption that a delay of over five months in filing a transcript as part of the record on appeal was unreasonable and inexcusable. *ACCC Ins. Co. v. Pizza Hut of Am., Inc.*, No. A11A1905, 2012 Ga. App. LEXIS 127 (Feb. 10, 2012).

Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was in error as to two of the children who filed affidavits of indigency; assuming the children filed true affidavits of indigence (O.C.G.A. § 9-15-2(a)(2), (b)), the children had rights to appeal from the dismissal of the children's proportionate shares of the wrongful death case as: (1) the wrongful death claim was not jointly in all the children or in none of the children; and (2) originally, each child had a separate claim for one-fourth of the value of the decedent's life. *Mapp v. We Care Transp. Servs.*, No. A11A1986; No. A11A1987, 2012 Ga. App. LEXIS 107 (Feb. 6, 2012).

Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was not an abuse of discretion as to the two children who did not pay costs or submit affidavits; the children, in addition to failing to pay costs or submit affidavits, offered no explanation for the children's failure to do so, which caused an unreasonable delay. *Mapp v. We Care Transp. Servs.*, No. A11A1986; No. A11A1987, 2012 Ga. App. LEXIS 107 (Feb. 6, 2012).

Hearing required.

Trial court erred in dismissing the development corporation's appeal from a judgment against it in a contract action after it did not pay a bill of costs that the clerk of the court mailed to it and did not request more time to pay since the trial court had an obligation to hold a hearing and determine whether the failure to pay and the failure to request more time to pay were inexcusable and unreasonably delayed transmission of the record to the appellate court. *McCorvey Dev. v. D. G. Jenkins Dev. Corp.*, 260 Ga. App. 276, 581 S.E.2d 308 (2003).

Delays of over 30 days, etc.

In accord with *Continental Inv. Corp. v. Cherry*. See *Stone v. Boyne*, 245 Ga. App. 868, 539 S.E.2d 209 (2000).

Delay of over 100 days unreasonable. — Trial court properly dismissed an oncologist's appeal in a breach of contract suit based on the oncologist's failure to pay costs under O.C.G.A. § 5-6-48(c). The oncologist did not pay the costs until over 100 days after the initial bill was sent, over 90 days after seeking permission to proceed in forma pauperis, and over 70 days after the denial of the request to proceed in forma pauperis; it had been determined that a delay in excess of 30 days was prima facie unreasonable and inexcusable. *Mitchell v. Cancer Carepoint, Inc.*, 299 Ga. App. 881, 683 S.E.2d 923 (2009).

Delay not unreasonable or inexcusable. — The trial court did not err in declining to dismiss a contractor's appeal for failure to pay costs timely pursuant to O.C.G.A. § 5-6-48(c), as it was authorized to find that the delay in the clerk's receipt

of payment was not unreasonable or inexcusable; the original bill of costs had been erroneously mailed to the former address of the contractor's counsel, which delayed receipt, and when the bill of costs was finally received, the contractor attempted to tender prompt payment of it and immediately delivered a new check upon finding that its previous check had not been received by the clerk of court. *J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Amendment of Record

Supplementation of record.

In the state's action to condemn game machines, it was error not to grant the machine owners' timely and proper motion to supplement the record on appeal. The Court of Appeals did not have the complete record before it, and it had considered the state's expert report to the exclusion of the owners' expert report, which it did not have and which the trial court had relied upon along with the state's report. *Damani v. State*, 284 Ga. 372, 667 S.E.2d 372 (2008).

Motion erroneously brought under § 5-6-41(f).

Section 5-6-41(f) is not to be used after rendition of an appellate court's decision as a vehicle to secure the grant of a motion for reconsideration or application for certiorari. Once the appellate court renders its decision, this section becomes the exclusive method for supplementing the record. *Hirsch v. Joint City County Bd. of Tax Assessors*, 218 Ga. App. 881, 463 S.E.2d 703 (1995).

Notice of Appeal

Where appealable judgment or order not included in notice, etc.

In accord with *Ballew v. State*. See *Zachery v. State*, 233 Ga. App. 519, 504 S.E.2d 466 (1998).

Sufficiency of notice. — An amended notice of appeal complied with the requirement of § 5-6-37 where an examination of the record clearly identified the judgment appealed from. In *re Burton*, 271 Ga. 491, 521 S.E.2d 568 (1999).

Notice of appeal containing the petitioner's name, indicating the opposing party, specifying the case number and that the

appeal involved an adverse ruling in petitioner's habeas corpus action satisfied the requirements of the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., and, in conjunction with a timely application for a certificate of probable cause, was sufficient to confer jurisdiction over the case upon the Supreme Court. *Hughes v. Sikes*, 273 Ga. 804, 546 S.E.2d 518 (2001).

When it was apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors were sought to be asserted upon appeal, the appeal was not subject to dismissal and shall be considered in accordance therewith. *Carter v. Fayette County*, 287 Ga. App. 175, 651 S.E.2d 108 (2007).

Application Generally

Where claim is clear, although formal enumeration and brief not filed.

Although defendant, who was convicted of a criminal offense and appealed pro se from a denial of defendant's motion for new trial, failed to set out defendant's enumerations of errors as part two of defendant's brief, as required by Ga. Ct. App. R. 22(a), and defendant also failed to clearly set out defendant's enumerations of errors within the brief that defendant filed, the court considered the merits of defendant's appeal pursuant to O.C.G.A. § 5-6-48(f), as was its duty when it was apparent from the notice of appeal, the record, the enumeration of errors, or any combination thereof what errors were sought to be asserted upon appeal. *Phillips v. State*, 267 Ga. App. 733, 601 S.E.2d 147 (2004).

Error sufficiently "set out separately." — In order to take into account the duty imposed by subsection (f), where the enumeration of errors filed in the appellate court identifies the trial court ruling asserted to be error, the error relied upon is sufficiently "set out separately" to require the appellate court to shoulder its constitutional responsibility to be a court of review. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Dismissal of appeal docketed in error. — Where plaintiffs appealed from a grant of summary judgment, defendants

filed a motion to dismiss the appeal which was granted and, between the filing of defendants' motion and the trial court's action on it, the clerk mistakenly transmitted the record to the court of appeals on plaintiffs' instructions, the appeal was subject to dismissal because of the trial court's dismissal which was unappealed from; plaintiffs' instructing the clerk to transmit the record when there was a pending motion filed by defendants could not be permitted to deprive the trial court of jurisdiction. *Ovestco Corp. v. Bowen*, 216 Ga. App. 121, 453 S.E.2d 94 (1994).

Dismissal of cross-appeal with main appeal.

Although under O.C.G.A. § 5-6-48(e), a cross-appeal may survive the dismissal of the main appeal, that is true only where the cross-appeal can stand on its own merit, and the Court of Appeals has no jurisdiction to entertain a cross-appeal which must derive its life from the main appeal. An appellant's voluntary withdrawal of its direct appeal requires the dismissal of a cross-appeal that has no independent basis for jurisdiction and, to the extent it holds otherwise, *MARTA v. Harrington, George & Dunn, P.C.*, 208 Ga. App. 736 (1993) is overruled. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

Appellant not obligated to prepare record, etc.

In accord with *Long v. City of Midway*. See *Holy Fellowship Church of God in Christ v. First Community Bank*, 242 Ga. App. 400, 530 S.E.2d 24 (2000).

County's appeal properly filed. — The fact that the county board of commissioners never voted to file an appeal at any meeting would not provide a legal basis for dismissing the appeal where the county met all the requirements of O.C.G.A. § 5-6-48 for filing its notice of appeal. *Board of Comm'rs v. Guthrie*, 273 Ga. 1, 537 S.E.2d 329 (2000).

Appeal dismissed.

An appeal by defendants, an individual and corporations, was dismissed under O.C.G.A. § 5-6-48(c). A total delay of 19 months was caused in significant part by defendants, not only by their failure to pay costs until 200 days after filing the notice of appeal and their failure to ensure

the prompt filing of the transcript, but also by their deliberate employment of multiple bankruptcy filings and inadequate affidavits of indigence. *Morrell v. W. Servs., LLC*, 291 Ga. App. 369, 662 S.E.2d 215 (2008).

Landlord was entitled to dismissal of a tenant's appeal because Ga. Ct. App. R. 23(a) required the tenant to file a brief containing an enumeration of errors within 20 days after the appeal was docketed; the appeal was docketed in October 2007, and the tenant had yet to file a brief with an enumeration of errors or respond to the landlord's motion to dismiss. *Smith v. R. James Props., Inc.*, 292 Ga. App. 317, 665 S.E.2d 19 (2008).

Defendant's flight and continued uncertainty as to defendant's whereabouts divested defendant of right to appeal. — Despite the fact that the defendant was not an escapee from custody, an appeal from the judgments entered was dismissed based on the defendant's flight and continued uncertainty as to the defendant's whereabouts; those actions amounted to an open defiance of the court's order and divestment of the right to appeal. *Mohamed v. State*, 289 Ga. App. 394, 657 S.E.2d 307 (2008).

Motion to dismiss appeal denied.

Because defendant's notice of appeal from Stephens County superior court was timely, defendant's error in confusing the counties in an appeal brief was inconsequential to the disposition of the case; thus, the state's motion to dismiss the appeal was denied. *McCroskey v. State*, 291 Ga. App. 15, 660 S.E.2d 735 (2008).

District attorney's motion to dismiss the defendant's appeal of a judgment denying the defendant's motion to strike an illegal sentence was denied because a direct appeal from the trial court's ruling was authorized; the defendant was contending that the defendant's sentence was illegal because the sentence was based on an unconstitutional statute, which was a colorable claim that the defendant's sentence imposed was void. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

Dismissal proper since record didn't include all evidence. — In the

pageant organizers' appeal from the trial court's denial of a judgment notwithstanding the verdict in the model's action for, inter alia, slander, the case was removed from the appeal docket as the record on appeal did not include all of the evidence presented to the jury. *Galardi v. Steele-Inman*, 259 Ga. App. 249, 575 S.E.2d 921 (2002).

No error in favoring transcript. — Trial court did not err in denying a wife's request that the court reporter's audiotapes be replayed in her presence to establish the accuracy of the certified transcript of the wife's remarks against her recollection thereof because the wife did not show error in the trial court's failure to adopt

the wife's recollected version of what transpired during the hearing in favor of the court reporter's certified transcript. *Willis v. Willis*, 288 Ga. 577, 707 S.E.2d 344 (2010).

Appeals based on void sentence. — State's motion to dismiss defendant's appeal was without merit and had to be denied, as defendant was entitled to directly appeal the denial of defendant's petition attacking defendant's sentence based on the contention that the sentence was void; however, defendant was unable to show that the sentence was void, and, therefore, defendant's sentence was permissible. *Daniel v. State*, 262 Ga. App. 474, 585 S.E.2d 752 (2003).

RESEARCH REFERENCES

ALR. — Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 ALR5th 704.

Effect of escape by, or fugitive status of,

state criminal defendant on availability of appeal or other post-verdict or post-conviction relief — State cases, 105 ALR5th 529.

5-6-49. Bills of exceptions, exceptions pendente lite, assignments of error abolished; contents of motions for new trial and for j.n.o.v.

JUDICIAL DECISIONS

Issue preserved for review. — Claim on appeal that the trial court erred by refusing to consider a request for a nonjury bench trial in a criminal matter was preserved for review despite the fact that the counsel did not state an exception or file an objection to the trial court's ruling, as the "bill of exceptions" requirement was abolished a long time ago pursuant to O.C.G.A. § 5-6-49(a); the trial court did not err, as there was no requirement that a defendant be given a nonjury trial upon a request and nothing prevented trial courts from ensuring that

defendants were given their constitutional jury trial right pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI. *Lindo v. State*, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Given that once the trial court addressed the defendant's motion regarding sequestration of the lead investigating officer and the trial court issued a ruling, the defendant did not need to further object to the same in order to preserve the issue for appeal. *Stafford v. State*, 288 Ga. App. 733, 655 S.E.2d 221 (2007), cert. denied, 2008 Ga. LEXIS 489 (Ga. 2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 399.

5-6-50. Procedure provided by article supersedes former appellate procedure.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 2.

5-6-51. Forms.

The following suggested forms are declared to be sufficient, but any other form substantially complying therewith shall also be sufficient:

(1) **Notice of appeal — Civil cases.**

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

Plaintiffs

v.

Defendants

)

)

)

)

)

)

)

)

)

)

Civil action

File no. _____

NOTICE OF APPEAL

Notice is hereby given that _____ and _____, defendants above-named, hereby appeal to the _____ (Court of Appeals or Supreme Court) from the _____ (describe order or judgment) entered in this action on _____ (date) _____.

Motion for new trial (or motion for judgment n.o.v., etc.) was filed and overruled (or granted, etc.) on _____ (date) _____.

The clerk will please omit the following from the record on appeal:

1. _____

2. _____

3. _____

Transcript of evidence and proceedings will/will not be filed for inclusion in the record on appeal.

This court, rather than the (Court of Appeals or Supreme Court) has jurisdiction of this case on appeal for the reason that _____.

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Dated: _____.

Attorney for appellants

Address

(CERTIFICATE OF SERVICE)

(2) **Notice of appeal — Criminal cases.**

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
The State (etc.))	
)	
	)	(Indictment)
v.	)	(Accusation)
	)	No. _____
_____)	
Defendant)	

NOTICE OF APPEAL

Notice is hereby given that _____, defendant above-named, hereby appeals to the _____ (Court of Appeals or Supreme Court) from the judgment of conviction and sentence entered herein on _____ (date) _____, _____.

The offense(s) for which defendant was convicted is (are) _____, and the sentence(s) imposed is (are) as follows: _____.

Motion for new trial (or motion in arrest of judgment, etc.) was filed and overruled on _____ (date) _____, _____.

The clerk will please omit the following from the record on appeal:

- 1. _____
- 2. _____
- 3. _____

Transcript of evidence and proceedings will/will not be filed for inclusion in the record on appeal.

This court, rather than the (Court of Appeals or Supreme Court) has jurisdiction of this case on appeal for the reason that _____.

Dated: _____.

Attorney for appellant

Address

(CERTIFICATE OF SERVICE)

(3) **Notice of cross appeal.**

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiffs)	
)	
v.	)	Civil action
	)	File no. _____
)	
_____)	
Defendants)	

NOTICE OF CROSS APPEAL

Notice is hereby given that _____, one of the defendants above-named, hereby cross appeals to the _____ (Court of Appeals or Supreme Court) from the _____ (describe order or judgment) entered in this action on _____ (date), _____.

Notice of appeal was heretofore filed on _____ (date), _____.

The clerk will please include the following in the record on appeal, all of which were designated for omission by appellant:

- 1. _____
- 2. _____
- 3. _____

Transcript of evidence and proceedings (will be filed) (will not be filed) (has already been designated to be filed by appellant) for inclusion in the record on appeal.

Dated: _____.

Attorney for cross appellant

Address

(CERTIFICATE OF SERVICE)

(4) Enumeration of errors.

ENUMERATION OF ERRORS

- 1. The court erred in charging the jury on gross negligence.
- 2. The court erred in admitting the testimony of witness Smith concerning his opinion as to how the collision happened.
- 3. The court erred in refusing to grant a mistrial because of the misconduct of plaintiff’s attorney in oral argument.
- 4. The court erred in refusing to admit in evidence testimony of witness Jones concerning his estimate as to damages.
- 5. The court erred in denying defendant’s motion for continuance.

(Ga. L. 1965, p. 18, § 20; Ga. L. 1966, p. 493, §§ 8, 8A; Ga. L. 1973, p. 303, § 2; Ga. L. 1984, p. 22, § 5; Ga. L. 1999, p. 81, § 5.)

The 1999 amendment, effective April 5, 1999, part of an Act to revise, modernize, and correct the Code, deleted “19” from the date lines in the forms in paragraphs (1) through (3).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, §§ 67, 69.

CHAPTER 7

APPEAL OR CERTIORARI BY STATE IN CRIMINAL CASES

Sec.	Sec.
5-7-1. Orders, decisions, or judgments appealable; defendant’s right to cross appeal.	5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments; exception; motion for new trial.
5-7-1.1. Right of state to direct appeal in certain delinquency cases [Repealed].	

5-7-1. Orders, decisions, or judgments appealable; defendant’s right to cross appeal.

(a) An appeal may be taken by and on behalf of the State of Georgia from the superior courts, state courts, City Court of Atlanta, and

juvenile courts and such other courts from which a direct appeal is authorized to the Court of Appeals of Georgia and the Supreme Court of Georgia in criminal cases and adjudication of delinquency cases in the following instances:

(1) From an order, decision, or judgment setting aside or dismissing any indictment, accusation, or petition alleging that a child has committed a delinquent act or any count thereof;

(2) From an order, decision, or judgment arresting judgment of conviction or adjudication of delinquency upon legal grounds;

(3) From an order, decision, or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy;

(4) From an order, decision, or judgment suppressing or excluding evidence illegally seized or excluding the results of any test for alcohol or drugs in the case of motions made and ruled upon prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first;

(5) From an order, decision, or judgment of a court where the court does not have jurisdiction or the order is otherwise void under the Constitution or laws of this state;

(6) From an order, decision, or judgment of a superior court transferring a case to the juvenile court pursuant to subparagraph (b)(2)(B) of Code Section 15-11-28;

(7) From an order, decision, or judgment of a court granting a motion for new trial or an extraordinary motion for new trial;

(8) From an order, decision, or judgment denying a motion by the state to recuse or disqualify a judge made and ruled upon prior to the defendant being put in jeopardy; or

(9) From an order, decision, or judgment issued pursuant to subsection (c) of Code Section 17-10-6.2.

(b) In any instance in which any appeal is taken by and on behalf of the State of Georgia in a criminal case, the defendant shall have the right to cross appeal. Such cross appeal shall be subject to the same rules of practice and procedure as provided for in civil cases under Code Section 5-6-38. (Ga. L. 1973, p. 297, § 1; Ga. L. 1984, p. 22, § 5; Ga. L. 1994, p. 311, § 1; Ga. L. 1994, p. 1012, § 28; Ga. L. 2000, p. 20, § 3; Ga. L. 2000, p. 862, § 2; Ga. L. 2003, p. 247, § 2; Ga. L. 2005, p. 20, § 3/HB 170; Ga. L. 2006, p. 379, § 3/HB 1059; Ga. L. 2012, p. 899, § 1-1/HB 1176.)

The 2000 amendments. — The first substituted “Code Section 15-11-28” for 2000 amendment, effective July 1, 2000, “Code Section 15-11-5” at the end of para-

graph (5) of subsection (a). The second 2000 amendment, effective July 1, 2000, in the introductory language of subsection (a), inserted “, state courts, City Court of Atlanta, and juvenile courts” and inserted “and adjudication of delinquency cases”; in paragraph (1) of subsection (a), substituted a comma for “or” and inserted “, or petition alleging that a child has committed a delinquent act”; inserted “or adjudication of delinquency” in paragraph (2) of subsection (a); in paragraph (4) of subsection (a), substituted “suppressing or excluding” for “sustaining a motion to suppress”, inserted “or excluding the results of any test for alcohol or drugs”, added “or the defendant being put in jeopardy, whichever occurs first” at the end of the paragraph and deleted “or”; added present paragraph (5) of subsection (a); redesignated former paragraph (5) of subsection (a) as present paragraph (6) of subsection (a); in paragraph (6) of subsection (a), inserted “of a superior court” and substituted “15-11-28” for “15-11-5” at the end of the paragraph.

The 2003 amendment, effective May 27, 2003, in subsection (a), deleted “or” from the end of paragraph (a)(5), substituted “; or” for a period at the end of paragraph (a)(6), and added paragraph (a)(7).

The 2005 amendment, effective July 1, 2005, deleted “or” from the end of paragraph (a)(6), in paragraph (a)(7), inserted “a motion for new trial or”, and substituted “; or” for a period at the end, and added paragraph (a)(8). See the editor’s note for applicability.

The 2006 amendment, effective July 1, 2006, deleted “or” at the end of paragraph (a)(7); substituted “; or” for the period at the end of paragraph (a)(8); and added paragraph (a)(9).

The 2012 amendment, effective July 1, 2012, deleted “superior” preceding “court” in paragraph (a)(7). See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2005, p. 20, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Criminal Justice Act of 2005.’”

Ga. L. 2005, p. 20, § 17, not codified by the General Assembly, provides that this

Act shall apply to all trials which commence on or after July 1, 2005.

Ga. L. 2006, p. 379, § 1, not codified by the General Assembly, provides that: “The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

“(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

“(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

“(3) Providing for community and public notification concerning the presence of sexual offenders;

“(4) Collecting data relative to sexual offenses and sexual offenders;

“(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

“(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

“The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is suffi-

cient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c), not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law,

nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to offenses which occur on or after July 1, 2012. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 119 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDGMENTS DISMISSING INDICTMENT OR ACCUSATIONS

DOUBLE JEOPARDY

ORDERS SUPPRESSING EVIDENCE

APPLICATION GENERALLY

General Consideration

State is authorized to appeal a void sentence pursuant to O.C.G.A. § 5-7-1(a)(5), and the state's appeals are governed by the same time limitations as those applied to other appellants in criminal cases, pursuant to O.C.G.A. § 5-7-4. *State v. Jones*, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

In the absence of express statutory authority requiring the state to file a motion to amend an improper sentence as a prerequisite to appealing that sentence, the state may appeal directly the sentence imposed by the trial court or file a motion to amend the sentence and then directly appeal the denial thereof, but in any

event, the state has 30 days from judgment or from the denial of the motion to amend to file its notice of appeal; however, should the defendant file a motion for new trial, that motion tolls the time within which the state can directly appeal the sentence, and in that case, the state has 30 days from the denial of the motion for new trial to appeal the alleged improper sentence. *State v. Jones*, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

Defendant properly granted new trial. — Upon the state's appeal pursuant to O.C.G.A. § 5-7-1(a)(7), as amended in 2005, the appeals court found that the defendant was properly granted a new trial based on the ineffective assistance of trial counsel, given counsel's failure to

interview any of the state's witnesses, present a viable defense to the charge of involuntary manslaughter, and adequately investigate whether the victim's death might have been an accident. *State v. McMillon*, 283 Ga. App. 671, 642 S.E.2d 343 (2007).

Court of Appeals lacked jurisdiction. — The Court of Appeals was without jurisdiction to entertain the state's appeal of a dismissal of a juvenile court petition. *In re J.H.*, 228 Ga. App. 154, 491 S.E.2d 209 (1997).

Because the state, in the person of the district attorney, attempted to avoid the restrictions in O.C.G.A. § 5-7-1 et seq., by attacking by way of mandamus and prohibition an alleged magistrate court policy concerning rulings made in criminal prosecutions, and because the state had no ability to appeal the policy, the trial court erred by considering the state's petition for mandamus and prohibition. *Magistrate Court v. Fleming*, 284 Ga. 457, 667 S.E.2d 356 (2008).

No jurisdiction to grant extraordinary motion for a new trial. — An extraordinary motion for new trial is not among those statutorily enumerated circumstances in which the state may challenge a judgment in a criminal case, therefore, the trial court was without jurisdiction to entertain the state's motion or to grant the requested relief. *Moody v. State*, 272 Ga. 55, 525 S.E.2d 360 (2000).

Dismissal of petition for writs of mandamus and prohibition. — In an original action brought before the Supreme Court of Georgia, the Court dismissed a petition for writs of mandamus and prohibition filed by a prosecutor regarding a criminal prosecution as the prosecutor was not entitled to use the writs to circumvent the statutory limitations on the state's ability to appeal under O.C.G.A. §§ 5-7-1 and 5-7-2. *Howard v. Fuller*, No. S08O0357, 2007 Ga. LEXIS 873 (Nov. 30, 2007).

Cited in *State v. Levins*, 235 Ga. App. 739, 507 S.E.2d 246 (1998); *State v. Levins*, 235 Ga. App. 739, 507 S.E.2d 246 (1998); *State v. Alexander*, 245 Ga. App. 666, 538 S.E.2d 550 (2000); *State v. Murphy*, 246 Ga. App. 246, 540 S.E.2d 231 (2000); *State v. Ware*, 258 Ga. App. 564,

574 S.E.2d 632 (2002); *State v. Smith*, 276 Ga. 14, 573 S.E.2d 64 (2002); *State v. Allen*, 262 Ga. App. 724, 586 S.E.2d 378 (2003); *State v. Lowe*, 263 Ga. App. 1, 587 S.E.2d 169 (2003); *State v. Glass*, 279 Ga. 696, 620 S.E.2d 371 (2005); *Pierce v. State*, 278 Ga. App. 162, 628 S.E.2d 235 (2006); *State v. Hardy*, 281 Ga. App. 365, 636 S.E.2d 36 (2006); *State v. Johnson*, 282 Ga. App. 102, 637 S.E.2d 825 (2006); *State v. Austell*, 285 Ga. App. 18, 645 S.E.2d 550 (2007); *State v. Lamb*, 287 Ga. App. 389, 651 S.E.2d 504 (2007); *Kramer v. State*, 287 Ga. App. 796, 652 S.E.2d 843 (2007), cert. denied, 2008 Ga. LEXIS 289 (Ga. 2008); *State v. Pye*, 282 Ga. 796, 653 S.E.2d 450 (2007); *State v. O'Neal*, 292 Ga. App. 884, 665 S.E.2d 926 (2008); *State v. Jones*, 284 Ga. 302, 667 S.E.2d 76 (2008); *State v. Felton*, 297 Ga. App. 35, 676 S.E.2d 434 (2009); *State v. Jeffries*, 298 Ga. App. 141, 679 S.E.2d 368 (2009); *State v. Burks*, 285 Ga. 781, 684 S.E.2d 269 (2009); *State v. Corhen*, 306 Ga. App. 495, 700 S.E.2d 912 (2010); *Tyner v. State*, 289 Ga. 592, 714 S.E.2d 577 (2011).

Judgments Dismissing Indictment or Accusations

State may appeal order dismissing indictment, etc.

The state's appeal of an order directing a verdict of acquittal on charges against a defendant for family violence battery and cruelty to children was valid because the order was not based on the merits of the case but rather on the fact that the state could not prove any wrongdoing by the defendant on the date stated within the accusation; thus, the trial court's order was actually a dismissal of the accusation. *State v. Swint*, 284 Ga. App. 343, 643 S.E.2d 840 (2007).

The state was permitted to appeal a judgment of a trial court sustaining defendant's demurrer as, while the hearing transcript showed that the trial court considered granting defendant's motion for a directed verdict, the trial court's ultimate ruling was limited to sustaining the demurrer and, in effect, dismissing the accusation because of how the accusation was worded. When the ruling of the trial court is in substance a dismissal of the indictment, the state may appeal an order

dismissing an indictment under O.C.G.A. § 5-7-1(a)(1). *State v. Shabazz*, 291 Ga. App. 751, 662 S.E.2d 828 (2008).

Dismissal of state's appeal under O.C.G.A. § 5-6-48(c) upheld. — The trial court properly dismissed the state's appeal from an order barring the defendant's trial on speedy trial grounds, pursuant to O.C.G.A. § 5-6-48(c), as the order was not the type the state had a right to pursue under O.C.G.A. § 5-7-1; moreover, the order was not void, as it was entered by a court of competent jurisdiction. *State v. Glover*, 281 Ga. 633, 641 S.E.2d 543 (2007).

Transfer order was appealable by state. — O.C.G.A. § 5-7-1(a)(1) granted the state the right to appeal in a criminal case from an order transferring a case from the state court to the recorder's court as the order effectively set aside or dismissed the state court accusation against defendant and precluded defendant's prosecution there; defendant's motion to dismiss the state's appeal of the order granting the motion to transfer was denied. *State v. Serio*, 257 Ga. App. 369, 571 S.E.2d 168 (2002).

Transfer order was not appealable by state. — Juvenile court erred in finding that a juvenile case involving armed robbery with a firearm was subject to the transfer provisions delineated in O.C.G.A. § 15-11-30.2 because, under subsection (f) of that section, the transfer provisions did not apply in cases involving armed robbery with a firearm, which were subject to the exclusive jurisdiction of the superior court under O.C.G.A. § 15-11-28(b)(2)(A)(vii). However, because the juvenile court had concurrent jurisdiction to enter the judgment due to the state's filing a petition in the juvenile court, the state had no right to appeal from the petition pursuant to O.C.G.A. § 5-7-1(A)(5). *In re D. L.*, 302 Ga. App. 234, 690 S.E.2d 522 (2010).

Trial court's order quashing an indictment based solely on the failure to revise the grand jury list during the time period set forth in O.C.G.A. § 15-12-40(a)(1) was reversed, as the statute was not obligatory, but directory in nature, merely suggesting a timetable for grand jury lists to be revised; hence, the

trial court's order was reversed. *State v. Parlor*, 281 Ga. 820, 642 S.E.2d 54 (2007).

Charge improperly dismissed. — Because the defendant's alleged mistake of fact regarding a charge of possession of a firearm by a convicted felon required consideration of facts extrinsic to the accusation to be decided by a jury, the trial court erred in dismissing the charge, sua sponte; moreover, as such dismissal was not an adjudication of guilt, the state could appeal from the same without violating the defendant's double jeopardy rights. *State v. Henderson*, 283 Ga. App. 111, 640 S.E.2d 686 (2006).

Double Jeopardy

O.C.G.A. § 5-7-1(a)(3) gave an appellate court authority to consider the State of Georgia's appeal with regard to the defendant's plea in bar contending that double jeopardy prohibited a second trial on the same charges. *State v. Caffee*, No. S11A1529, 2012 Ga. LEXIS 344 (Mar. 19, 2012).

Orders Suppressing Evidence

State appeal not allowed. — Because the state failed to request that the trial court put an oral order of suppression in writing, and show that the trial court refused to do so, it did not have the right to appeal from said order; moreover, while the state could have filed a mandamus petition seeking to require the court to do put the oral order in writing, it did not seek said relief. *State v. Morrell*, 281 Ga. 152, 635 S.E.2d 716 (2006).

In a defendant's prosecution for drug possession, the state did not have the right to appeal under O.C.G.A. § 5-7-1(a)(4) from an oral ruling that suppressed the defendant's statements prior to the defendant's arrest at a stop scene for failure to give Miranda warnings because the transcript did not affirmatively show that the state requested the trial court to put the oral order in written form and that the trial court refused to do so. *State v. Kipple*, 294 Ga. App. 420, 669 S.E.2d 185 (2008).

Exclusion based upon general rule of evidence. — An appeal from an order dismissing a case for lack of prosecution was not authorized where the order was

the result of the exclusion of evidence based upon some general rule of evidence; reversing *State v. Berky*, 214 Ga. App. 174, 447 S.E.2d 147 (1994). *Berky v. State*, 266 Ga. 28, 463 S.E.2d 891 (1995).

State appeal allowed. — The state could appeal an order suppressing evidence that was based on general rules of evidence and on grounds that the evidence had been obtained in violation of law. *State v. Pastorini*, 226 Ga. App. 260, 486 S.E.2d 399 (1997).

Although the state may not appeal from an order excluding evidence on the basis only of some general rule of evidence, the state may appeal under O.C.G.A. § 5-7-1(a)(4) from an order, decision, or judgment suppressing or excluding evidence illegally seized, including orders that suppress evidence based both upon general rules of evidence and a determination that the evidence was illegally obtained; thus, where the basis for the trial court's order granting a defendant's suppression motion was not stated in the order, but the suppression motion itself was based both on the warrant being improper and on the evidence being inadmissible apart from the warrant issue, the state's appeal was authorized pursuant to O.C.G.A. § 5-7-1(a)(4). *State v. Kramer*, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

After a trial court granted the defendant's suppression motion with respect to DNA evidence that was obtained pursuant to a search warrant, which the trial court found was not executed in compliance with statutory prerequisites, the state had a right to appeal that ruling directly pursuant to O.C.G.A. § 5-7-1(a)(4). *State v. Stafford*, 277 Ga. App. 852, 627 S.E.2d 802 (2006).

Because O.C.G.A. § 5-7-1(a)(4) afforded the state a direct right of appeal from an order granting suppression of the defendant's statement to law enforcement as involuntarily made, the defendant's motion to dismiss the state's appeal was denied. *State v. Stanfield*, 290 Ga. App. 62, 658 S.E.2d 837 (2008).

State's direct appeal of a judgment granting the defendant's motion to suppress evidence that the victims identified the defendant from photographic lineups was authorized by O.C.G.A. § 5-7-1(a)(4)

because the state's direct appeal was from an order that: (1) was issued prior to the impaneling of a jury or the defendant being put in jeopardy; and (2) granted the defendant's motion to suppress evidence that was allegedly obtained in an illegal manner, and which the trial court deemed to be "meritorious" even apart from the prosecutor's supposed dilatory conduct. During the final hearing on the defendant's motion, the trial court refused to allow the state to present evidence to contest the motion as a means of sanctioning the state for prosecutorial conduct that the trial court deemed to be dilatory in nature, and the fact that the trial court was the direct cause of the state's inability to meet the state's burden of showing that the identifications were lawfully obtained in no way divested the court of appeals of jurisdiction to hear its appeal pursuant to § 5-7-1(a)(4). *State v. Smith*, 308 Ga. App. 345, 707 S.E.2d 560 (2011).

Admission of videotape. — In a prosecution for obstruction of a law enforcement officer and simple battery, suppression of a videotape on the ground that it did not capture the entire encounter between the officer and the defendant was error because the probative value of the videotape was not substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Forehand*, 246 Ga. App. 590, 542 S.E.2d 110 (2000).

Application Generally

Appellate jurisdiction not found.

This section did not authorize the state to appeal from an order of the trial court merging various counts for sentencing. *Gibbins v. State*, 229 Ga. App. 896, 495 S.E.2d 46 (1998).

Under O.C.G.A. § 5-7-1, the State of Georgia was not authorized to appeal a trial court's ruling as to an anticipated jury charge. *Height v. State*, 278 Ga. 592, 604 S.E.2d 796 (2004).

Because a trial court's order denying defendant's special demurrer was not a final order, and because an O.C.G.A. § 5-7-2 certificate of immediate review was not issued, the Court of Appeals lacked jurisdiction under O.C.G.A. § 5-7-1 to affirm the trial court's order.

State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (2011).

Orders denying state's motions to allow similar transaction evidence and for reconsideration not directly appealable. — Supreme court could not review the trial court's denial of the state's motion to allow similar transaction evidence and its motion for reconsideration because neither of these rulings was directly appealable; where the state appeals from one or more orders listed in O.C.G.A. § 5-7-1(a), O.C.G.A. § 5-6-34(d) does not authorize appellate review of any other ruling in the case because § 5-6-34(d) was not intended to apply to appeals pursuant to § 5-7-1 et seq. since the General Assembly deliberately omitted from § 5-6-34(d) appeals taken or authorized under § 5-7-1. State v. Lynch, 286 Ga. 98, 686 S.E.2d 244 (2009).

State's appeal from void order. — State could properly challenge a trial court's order denying its motion to vacate an order granting a defendant's motion for a mistrial two months after the jury returned its verdict through a direct appeal because the order granting the mistrial was legally void. State v. Sumlin, 281 Ga. 183, 637 S.E.2d 36 (2006).

Recusal of trial judge. — An order denying the state's motion to recuse is not expressly included in the list enumerated in the statute of situations in which the state may appeal and, therefore, such an order is not appealable by the state. Ritter v. State, 269 Ga. 884, 506 S.E.2d 857 (1998).

Appeal from finding of immunity from prosecution. — Because O.C.G.A. § 5-7-1(a)(1) provides that the state may appeal an order dismissing "any count" of the indictment, the trial court's order that in effect dismissed two of the three counts by finding that the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2 was appealable. State v. Yapó, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

Order of trial court disqualifying district attorney. — State did not have the right to appeal an order of the trial court disqualifying the district attorney from prosecuting a criminal defendant. State v. Smith, 268 Ga. 75, 485 S.E.2d 491 (1997).

Motion to disclose identity of informant. — State was without authority to appeal from the grant of a motion to disclose the identity of the confidential informant because it was not among the enumerated instances set forth in this section, nor was the order dispositive of the charges against defendant. Glenn v. State, 271 Ga. 604, 523 S.E.2d 13 (1999).

Order placing case on dead docket not appealable. — Trial court's order placing a case on the court's dead docket was not a dismissal of the accusation from which the state could bring an appeal. State v. Creel, 216 Ga. App. 394, 454 S.E.2d 804 (1995).

Order in arrest of judgment. — Where the jury returned a verdict finding defendant guilty of the offenses of murder and hindering apprehension involving the same victim, and the trial court concluded as a matter of law that the verdicts were mutually exclusive and, therefore, vacated the felony-murder conviction and sentence, the court's order was, in effect, an order in arrest of judgment and the state was entitled to file a direct appeal. State v. Freeman, 272 Ga. 813, 537 S.E.2d 92 (2000).

Void sentences.

Upon a conviction of methamphetamine trafficking, because the sentence imposed by a trial judge against the defendant under O.C.G.A. § 16-13-31(g)(2) was supported by the record evidence that the defendant assisted the police in identifying a methamphetamine supplier, and did not result from an illegal departure from O.C.G.A. § 16-13-31(e)(1), the state's appeal from imposition of the same on grounds that it was void was dismissed. State v. Carden, 281 Ga. App. 886, 637 S.E.2d 493 (2006).

State cannot appeal defendant's choice to proceed without jury. — Since the trial court's ruling denying the state's objection to conducting defendant's criminal trial without a jury was not the type of ruling that the state was statutorily authorized to appeal, the state's appeal to the state supreme court regarding that denial and the denial of the state's petition for a writ of prohibition to compel a trial with a jury had to be dismissed. Howard v. Lane, 276 Ga. 688, 581 S.E.2d 1 (2003).

Because the trial court's adjudication of guilt entered against the defendant after a bench trial over the state's objection did not grant the state a right to appeal under O.C.G.A. § 5-7-1(a)(5), and the adjudication did not amount to a void judgment entered without jurisdiction, the state's appeal was dismissed. *State v. Evans*, 282 Ga. 63, 646 S.E.2d 77 (2007).

State appeal from granting of motion to suppress. — While the state had a right to appeal from the trial court's act of granting defendant's motion to suppress, the trial court's ruling that defendant invoked defendant's right to remain silent was not clearly erroneous as the record showed that defendant shook defendant's head in the negative when the state police investigator asked the defendant, "You don't want to talk about it?" and, thus, the inculpatory statements defendant made in regard to the shooting of another person had to be suppressed. *State v. Nash*, 279 Ga. 646, 619 S.E.2d 684 (2005).

State's appeal from void sentence. — Since the state was authorized to directly appeal from an allegedly void sentence, the state's argument that a trial

court erred in failing to allow it to withdraw from a plea agreement was properly before the appellate court. *State v. Harper*, 279 Ga. App. 620, 631 S.E.2d 820 (2006).

State was required to file certificate of immediate review in order to appeal an order granting defendant a new trial. — Upon an appeal by the state from an order granting the defendant a new trial, because the state failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the state's attempted appeal was nugatory and did not activate the appellate jurisdiction of the Supreme Court of Georgia. Accordingly, that appeal was dismissed. *State v. Ware*, 282 Ga. 676, 653 S.E.2d 21 (2007).

Because the former version of O.C.G.A. § 5-7-2, which was then in effect, required the State of Georgia to obtain a certificate within ten days of the entry of an order granting a new trial and the state did not obtain the required certificate, the state did not have a right to file a direct appeal under O.C.G.A. § 5-7-1(a)(7). *State v. Caffee*, No. S11A1529, 2012 Ga. LEXIS 344 (Mar. 19, 2012).

Cited in *State v. Sammons*, 283 Ga. 364, 659 S.E.2d 598 (2008).

5-7-1.1. Right of state to direct appeal in certain delinquency cases.

Repealed by Ga. L. 2000, p. 862, § 3, effective July 1, 2000.

Editor's notes. — This Code section was based on Ga. L. 1994, p. 856, § 1.

5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments; exception; motion for new trial.

(a) Except as provided in subsection (b) of this Code section, in any appeal under this chapter where the order, decision, or judgment is not final, it shall be necessary that the trial judge certify within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that an immediate review should be had.

(b) A certificate of immediate review shall not be required from an:

(1) Order, decision, or judgment suppressing or excluding illegally seized evidence; or

(2) Order, decision, or judgment described in paragraph (1) or (7) of subsection (a) of Code Section 5-7-1.

(c) For purposes of this Code section, the granting of a motion for new trial or an extraordinary motion for new trial shall be considered a final order. (Ga. L. 1973, p. 297, § 2; Ga. L. 2011, p. 612, § 1/HB 390; Ga. L. 2012, p. 899, § 1-2/HB 1176.)

The 2011 amendment, effective May 12, 2011, designated the existing provisions as subsection (a); substituted “Except as provided in subsection (b) of this Code section” for “Other than from an order, decision, or judgment sustaining a motion to suppress evidence illegally seized” at the beginning of subsection (a); and added subsections (b) and (c).

The 2012 amendment, effective July 1, 2012, inserted “(1) or” in paragraph (b)(2). See the editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899,

§ 9-1(a)/HB 1176, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to offenses which occur on or after July 1, 2012. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.

JUDICIAL DECISIONS

State’s right of appeal in criminal cases is strictly construed.

Upon an appeal by the state from an order granting the defendant a new trial, because the state failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the state’s attempted appeal was nugatory and did not activate the appellate jurisdiction of the Supreme Court of Georgia. Accordingly, that appeal was dismissed. *State v. Ware*, 282 Ga. 676, 653 S.E.2d 21 (2007).

Because a trial court’s order denying defendant’s special demurrer was not a final order, and because an O.C.G.A. § 5-7-2 certificate of immediate review was not issued, the Court of Appeals lacked jurisdiction under O.C.G.A. § 5-7-1 to affirm the trial court’s order. *State v. Outen*, 289 Ga. 579, 714 S.E.2d 581 (2011).

Failure to obtain required certificate. — Because the former version of O.C.G.A. § 5-7-2, which was then in effect, required the State of Georgia to obtain a certificate within ten days of the

entry of an order granting a new trial and the state did not obtain the required certificate, the state did not have a right to file a direct appeal under O.C.G.A. § 5-7-1(a)(7). *State v. Caffee*, No. S11A1529, 2012 Ga. LEXIS 344 (Mar. 19, 2012).

Dismissal of petition for writs of mandamus and prohibition. — In an original action brought before the Supreme Court of Georgia, the Court dismissed a petition for writs of mandamus and prohibition filed by a prosecutor regarding a criminal prosecution as the prosecutor was not entitled to use the writs to circumvent the statutory limitations on the State’s ability to appeal under O.C.G.A. §§ 5-7-1 and 5-7-2. *Howard v. Fuller*, No. S08O0357, 2007 Ga. LEXIS 873 (Nov. 30, 2007).

Cited in *State v. Johnson*, 282 Ga. App. 102, 637 S.E.2d 825 (2006); *State v. Sammons*, 283 Ga. 364, 659 S.E.2d 598 (2008); *State v. Felton*, 297 Ga. App. 35, 676 S.E.2d 434 (2009); *Cnty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

5-7-4. Time limits and procedures governing appeal and certiorari by state.

JUDICIAL DECISIONS

State is authorized to appeal a void sentence pursuant to O.C.G.A. § 5-7-1(a)(5), and the state's appeals are governed by the same time limitations as those applied to other appellants in criminal cases. *State v. Jones*, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

In the absence of express statutory authority requiring the state to file a motion to amend an improper sentence as a prerequisite to appealing that sentence, the state may appeal directly the sentence imposed by the trial court or file a motion to amend the sentence and then directly appeal the denial thereof, but in any event, the state has 30 days from judgment or from the denial of the motion to amend to file its notice of appeal; however, should the defendant file a motion for new trial, that motion tolls the time within which the state can directly appeal the sentence, and in that case, the state has 30 days from the denial of the motion for new trial to appeal the alleged improper sentence. *State v. Jones*, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

Out-of-time appeal. — Defendant's out-of-time appeal was dismissed as defendant's attorney was not entitled to file a sua sponte notice of out-of-time appeal based on the subjective acknowledgment of the attorney's own ineffectiveness; only the trial court could determine whether the failure to file a timely notice of appeal was attributable to an attorney's ineffectiveness and, if so, grant a right to file an out-of-time appeal. *Carr v. State*, 281 Ga. 43, 635 S.E.2d 767 (2006).

Only trial court can grant right to out-of-time appeal. — Only the trial court can determine whether the failure to file a timely notice of appeal was attributable to an attorney's ineffectiveness and, if so, grant a right to file an out-of-time appeal; *Adams v. State*, 440 S.E.2d 639 (1994), and other such decisions cited in *Rowland v. State*, 452 S.E.2d 756 (1995), are expressly overruled to the extent that they approve another method for addressing procedurally deficient criminal appeals. *Carr v. State*, 281 Ga. 43, 635 S.E.2d 767 (2006).

TITLE 6

AVIATION

Chap.

3. Powers of Local Governments as to Air Facilities, 6-3-1 through 6-3-28.
5. Georgia Aviation Authority, 6-5-1 through 6-5-10.

Cross references. — Use of laser devices against aircraft, § 16-10-34. Georgia Aviation Hall of Fame, T. 50, C. 12, A. 4, P. 3.

RESEARCH REFERENCES

- Am. Jur. Trials.** — Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557.
Helicopter Accident Litigation, 22 Am. Jur. Trials 517.
Midair Breakup of V-Tail Bonanza Aircraft, 33 Am. Jur. Trials 561.
Malfunction and Loss of Spacecraft, 43 Am. Jur. Trials 293.
- Deep Vein Thrombosis and Air Travel, 95 Am. Jur. Trials 1.
- ALR.** — Liability of owner of wires, poles, or structures struck by aircraft for resulting injury or damage, 49 ALR5th 659.

CHAPTER 2

REGULATION OF AERONAUTICS, AIRCRAFT, AND AIRPORTS GENERALLY

6-2-1. Legislative intent.

RESEARCH REFERENCES

- ALR.** — Construction and application of § 105 Airline Deregulation Act (49 USCA § 41713), pertaining to preemption of authority over prices, routes, and services, 149 ALR Fed. 299.
- Preemption by airline deregulation act, 49 USCS § 41713(b)(1), of state law labor-related claim. 41 ALR Fed. 2d 215.

6-2-5. Lawful flight over lands and waters of state.

RESEARCH REFERENCES

- Am. Jur. Pleading and Practice Forms.** — 4 Am. Jur. Pleading and Practice Forms, Aviation, § 2.

6-2-6. Rules for determination of liability for injury to or death of passengers.

RESEARCH REFERENCES

ALR. — Death of or injury to occupant of airplane from collision or near-collision with another aircraft, 64 ALR5th 235.	What constitutes accident under Warsaw Convention (49 USCA § 40105 note), 147 ALR Fed. 535.
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6-2-7. Rules for determination of liability of owners of aircraft for damages caused by collisions.

RESEARCH REFERENCES

ALR. — Death of or injury to occupant of airplane from collision or near-collision with another aircraft, 64 ALR5th 235.	What constitutes accident under Warsaw Convention (49 USCA § 40105 note), 147 ALR Fed. 535.
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CHAPTER 3

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

Article 2		Sec.	
Powers of Local Governments as to Air Facilities		6-3-27.	Powers and duties of counties, municipalities, and political subdivisions as to airports generally; enforcement of police regulations; powers of law enforcement officers.
Sec.			
6-3-20.	Acquisition, construction, maintenance, and control of airports and landing fields by local governments authorized.		

ARTICLE 2

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

6-3-20. Acquisition, construction, maintenance, and control of airports and landing fields by local governments authorized.

(a) Counties, municipalities, and other political subdivisions are authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such counties, municipalities, and other political subdivisions, and may use for such purpose or

purposes any available property that is owned or controlled by such counties, municipalities, or other political subdivisions. Counties and municipalities may enter into cooperative agreements with community improvement districts for the improvement of airports and landing fields within such community improvement districts, and community improvement districts may enter into such cooperative agreements with counties and municipalities for such purposes, in accordance with Article IX, Section VII of the Constitution.

(b) All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other state, as well as all municipalities and other political subdivisions which are located in such boundary counties, are authorized, separately, jointly with each other, or jointly with any county, municipality, or political subdivision of any such border state, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality, or political subdivision of any such border state other than the State of Georgia. (Ga. L. 1933, p. 102, § 1; Code 1933, § 11-201; Ga. L. 1941, p. 380, § 1; Ga. L. 2012, p. 1342, § 1/SB 371.)

The 2012 amendment, effective July 1, 2012, added the last sentence in subsection (a).

JUDICIAL DECISIONS

Property leased to airline for airport facilities was public use. — Five parcels of property at a city-owned airport that were leased to an airline and used for hangars, flight kitchens, and air cargo were reasonably and uniformly used for the public convenience and welfare to facilitate the effective operation of the airport, and were therefore exempt from ad

valorem taxation under O.C.G.A. § 48-5-41(a)(1)(B)(i). *City of Atlanta v. Clayton County Bd. of Tax Assessors*, 306 Ga. App. 381, 702 S.E.2d 704 (2010), cert. denied, No. S11C0342, 2011 Ga. LEXIS 222 (Ga. 2011); overruled on other grounds by *Gilmer County Bd. of Tax Assessors v. Spence*, 309 Ga. App. 482, 711 S.E.2d 51 (2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 4 Am. Jur. Pleading and Practice Forms, Aviation, §§ 88, 104.

6-3-21. Lands acquired, owned, leased, controlled, or occupied by local governments deemed for public purposes; effect on ad valorem taxation.

JUDICIAL DECISIONS

Lease of airport property to corporation.

Trial court erred in granting a county's motion to dismiss a lessee's action to recover a refund of ad valorem taxes on the ground that the lessee's claims that O.C.G.A. § 6-3-21 was unconstitutional were barred under the doctrine of collateral estoppel because in the previous litigation between the parties, the trial court only decided that O.C.G.A. § 6-3-21 applied to the lessee's interest and did not decide on the merits whether the statute was constitutional; untimeliness was the basis of the trial court's ruling on the lessee's constitutionality argument in the prior action. *Host Int'l, Inc. v. Clayton County*, 311 Ga. App. 414, 715 S.E.2d 805 (2011).

Property leased to airline for airport facilities was public use.

— Five parcels of property at a city-owned airport that were leased to an airline and used for hangars, flight kitchens, and air cargo were reasonably and uniformly used for the public convenience and welfare to facilitate the effective operation of the airport, and were therefore exempt from ad valorem taxation under O.C.G.A. § 48-5-41(a)(1)(B)(i). *City of Atlanta v. Clayton County Bd. of Tax Assessors*, 306 Ga. App. 381, 702 S.E.2d 704 (2010), cert. denied, No. S11C0342, 2011 Ga. LEXIS 222 (Ga. 2011); overruled on other grounds by *Gilmer County Bd. of Tax Assessors v. Spence*, 309 Ga. App. 482, 711 S.E.2d 51 (2011).

6-3-22. Methods of acquisition of property for airports and landing fields.

JUDICIAL DECISIONS

Condemnation power not granted by section. — Absent any direct or implied legislative authority to exercise the power of eminent domain in the enabling legislation, a municipal airport commission was not authorized to condemn property under this section. *Lopez-Aponte v. Columbus Airport Comm'n*, 221 Ga. App. 840, 473 S.E.2d 196 (1996).

Condemnation petitions of a municipal airport commission that failed to show the consent of the city to such actions should have been dismissed for failing to state a claim upon which relief could be granted. *Lopez-Aponte v. Columbus Airport Comm'n*, 221 Ga. App. 840, 473 S.E.2d 196 (1996).

6-3-27. Powers and duties of counties, municipalities, and political subdivisions as to airports generally; enforcement of police regulations; powers of law enforcement officers.

(a) Counties, municipalities, or other political subdivisions acquiring, establishing, developing, operating, maintaining, or controlling airports or landing fields under this article outside the geographical limits of such subdivisions are specifically granted the right to enforce police regulations on such airports or landing fields.

(b) A law enforcement officer of the county, municipality, or other political subdivision operating an airport or landing field outside the geographical limits of such political subdivision shall, when authorized by the county, municipality, or other political subdivision operating said airport or landing field, have the same law enforcement powers, including the powers of arrest, within such airport or landing field and on any public property within one-quarter mile of such airport or landing field as a law enforcement officer of the political subdivision in which such airport or landing field is located.

(c) Nothing in this Code section shall be construed as limiting the authority of any law enforcement agency of the county, municipality, or other political subdivision in which such airport or landing field is located. (Ga. L. 1933, p. 102, § 8; Code 1933, § 11-208; Ga. L. 2002, p. 1094, § 2.)

The 2002 amendment, effective June 1, 2002, designated the existing provisions as subsection (a); substituted “outside” for “without” near the middle of subsection (a); and added subsections (b) and (c).

Editor’s notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Transportation Security Act of 2002.’”

Cross references. — Transportation passenger safety, § 16-12-121 et seq.

CHAPTER 4

GEORGIA AIRPORT DEVELOPMENT AUTHORITY

Editor’s notes. — The State Airport System plan referred to in Ga. L. 1992, p. 1615, § 3, was completed by 1995. A subsequent Aviation System Plan was completed and approved by the Federal Aviation Administration on July 15, 2003.

CHAPTER 5

GEORGIA AVIATION AUTHORITY

Sec.		Sec.	
6-5-1.	Short title.	6-5-5.	Additional powers of the authority.
6-5-2.	Definitions.	6-5-6.	Moneys received deemed trust funds.
6-5-3.	Georgia Aviation Authority created; membership and personnel; administrative purposes.	6-5-7.	Public purpose of authority; responding to emergencies.
6-5-4.	Purpose of the authority; powers; support; annual audits.	6-5-8.	Jurisdiction for action.

- Sec.
6-5-9. Liberal construction.
6-5-10. Termination [Repealed].

Effective date. — This chapter became effective July 1, 2009.

Cross references. — Georgia Aviation Hall of Fame, T. 50, C. 12, A. 4, P. 3.

6-5-1. Short title.

This chapter shall be known and may be cited as the “Georgia Aviation Authority Act.” (Code 1981, § 6-5-1, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-2. Definitions.

As used in this chapter, the term:

(1) “Authority” means the Georgia Aviation Authority.

(2) “State aircraft” means any aircraft, including equipment, owned, leased, rented, chartered, or otherwise obtained by the authority. (Code 1981, § 6-5-2, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-3. Georgia Aviation Authority created; membership and personnel; administrative purposes.

(a) There is created a body corporate and politic to be known as the Georgia Aviation Authority which shall be deemed to be an instrumentality of the state and a public corporation, and by that name, style, and title the body may contract and be contracted with, implead and be impleaded, and bring and defend actions in all courts. The authority shall consist of the Governor or his or her designee, the Lieutenant Governor or his or her designee, the Speaker of the House of Representatives or his or her designee, the commissioner of transportation, the commissioner of public safety, the commissioner of economic development, the commissioner of natural resources, the director of the State Forestry Commission, and two persons from the aviation business community with one such member of the aviation business community to be appointed by the Speaker of the House of Representatives, and the other such member of the aviation business community to be appointed by the President of the Senate. The chairperson of the authority shall be a member of the authority elected for a two-year term by a majority vote of the members of the authority. A chairperson may not serve more than two consecutive terms as chairperson. The authority shall make rules and regulations for its own governance. It shall have perpetual existence.

(b) The authority is assigned to the Department of Administrative Services for administrative purposes only as prescribed in Code Section 50-4-3.

(c) The authority may in its discretion employ an executive director and other personnel. The authority may also by agreement with any department or agency of state government make use of personnel of such department or agency.

(d) The authority shall be subject to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(e) The authority may designate personnel positions employed by the authority as peace officers who shall be required by the terms of their employment to give their full time to the preservation of public order, the protection of life and property, the detection of crime, and such other duties as may be specified by the authority. Personnel in such positions shall comply with the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," and shall have the power of arrest in the performance of their duties. (Code 1981, § 6-5-3, enacted by Ga. L. 2009, p. 848, § 1/SB 85; Ga. L. 2011, p. 409, § 1/HB 414.)

The 2011 amendment, effective May 11, 2011, inserted "the commissioner of economic development," in the second sentence in subsection (a).

6-5-4. Purpose of the authority; powers; support; annual audits.

(a)(1)(A) The general purpose of the authority shall be to acquire, operate, maintain, house, and dispose of all state aviation assets, to provide aviation services and oversight of state aircraft and aviation operations to ensure the safety of state air travelers and aviation property, to achieve policy objectives through aviation missions, and to provide for the efficient operation of state aircraft.

(B) This Code section shall not diminish those powers and duties of the Department of Natural Resources under Code Section 12-2-11, the State Forestry Commission under Code Section 12-6-22.1, or the Department of Public Safety under Code Section 35-2-140.

(2)(A) All aircraft previously transferred to the authority by the Department of Public Safety and associated parts and equipment and a percentage of the budgeted operating funds associated with such aircraft shall be transferred on September 1, 2011, back to the custody and control of the Department of Public Safety; provided, however, that this chapter shall have no application to aircraft owned or operated by the Department of Defense.

(B) All aircraft under the custody and control of the authority as of June 30, 2012, which were previously transferred to the author-

ity by the Department of Natural Resources and associated parts and equipment and any budgeted operating funds associated with such aircraft shall be transferred on July 1, 2012, back to the custody and control of the Department of Natural Resources.

(C) All aircraft under the custody and control of the authority as of June 30, 2012, which were previously transferred to the authority by the State Forestry Commission and associated parts and equipment and any budgeted operating funds associated with such aircraft shall be transferred on July 1, 2012, back to the custody and control of the State Forestry Commission.

(D) For purposes of aerial aviation photography, the King Air 90 aircraft that was specially equipped and adapted to perform essential aerial photography under the custody and control of the authority as of June 30, 2012, which was previously transferred to the authority by the Department of Transportation, and associated parts and equipment specific to that aircraft shall be transferred on July 1, 2012, back to the custody and control of the Department of Transportation. The Department of Transportation shall have the authority to own, operate, maintain, and dispose of aircraft to support the aerial photography mission needs of the department.

(3) On and after July 1, 2009, or a later date determined by the Governor, no entity of state government shall acquire, lease, or charter any aircraft other than through the authority.

(4)(A) Any person who is employed by an entity of state government as a pilot and who is required by the terms of his or her employment to comply with the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," may remain in the employment of the employing agency but shall be transferred for administrative purposes only to the authority on July 1, 2009, in compliance with subsection (c) of Code Section 6-5-3.

(B) The provisions of subparagraph (A) of this paragraph notwithstanding:

(i) Those persons who are employed by the Department of Public Safety who are assigned for administrative purposes only to the authority shall be transferred back to the Department of Public Safety on September 1, 2011, and shall no longer be under the administration or direction of the authority;

(ii) Any persons who as of June 30, 2012, were employed by the authority pursuant to previous transfer from the Department of Natural Resources to the authority shall be transferred back to the Department of Natural Resources on July 1, 2012,

and shall no longer be under the administration or direction of the authority; and

(iii) Any persons who as of June 30, 2012, were employed by the authority pursuant to previous transfer from the State Forestry Commission to the authority shall be transferred back to the State Forestry Commission on July 1, 2012, and shall no longer be under the administration or direction of the authority.

(5)(A)(i) All state aircraft required for the proper conduct of the business of the several administrative departments, boards, bureaus, commissions, authorities, offices, or other agencies of Georgia and authorized agents of the General Assembly, or either branch thereof, and department owned airfields and their appurtenances shall be managed and maintained by the authority.

(ii) The provisions of division (i) of this subparagraph notwithstanding:

(I) All airfields and appurtenances, including hangars, previously transferred by the Department of Public Safety to the authority shall be transferred back to the Department of Public Safety on September 1, 2011;

(II) All airfields and appurtenances, including hangars, previously transferred by the Department of Natural Resources to the authority shall be transferred back to the Department of Natural Resources on July 1, 2012; and

(III) All airfields and appurtenances, including hangars, previously transferred by the State Forestry Commission to the authority shall be transferred back to the State Forestry Commission on July 1, 2012.

(B) The cost for the use of such state aircraft shall be charged by the authority to the using state entity. The amount of such charge shall be determined by the authority.

(6)(A) The authority shall be authorized to dispose of any state aircraft and apply the proceeds derived therefrom to the purchase of replacement aviation assets.

(B) This paragraph shall not apply to state aircraft assigned to the Department of Public Safety, the Department of Natural Resources, or the State Forestry Commission.

(b) In the furtherance of its purpose, the authority shall have the power to:

(1) Hire, organize, and train personnel to operate, maintain, house, purchase, and dispose of aviation assets;

(2) Purchase, maintain, develop, and modify facilities to support aviation assets and operations;

(3) Develop operating, maintenance, safety, security, training, education, and scheduling standards for state aviation operations and conduct inspections, audits, and other similar oversight to determine practices and compliance with such standards;

(4) Develop an accountability system for state aviation operations and activities;

(5) Identify the costs associated with the training, education, and purchase, operation, maintenance, and administration of state aircraft and aviation operations and related facilities; develop an appropriate billing structure; and charge agencies and other state entities for the costs of state aircraft and aviation operations; provided, however, that any billing to an agency by the authority shall be suspended whenever the Governor declares a state of emergency on any cost associated with aircraft used during and in response to the state of emergency;

(6) Retain appropriate external consulting and auditing expertise;

(7) Engage aviation industry representatives to ensure best practices for state aviation assets;

(8) Delegate certain powers pursuant to this chapter to other state entities; and

(9) Otherwise implement appropriate and efficient management practices for state aviation operations.

(c)(1) The authority shall provide priority support for those state agencies and departments, including local and state public safety and law enforcement entities, whose operations require aviation operations when requested.

(2)(A) No state entity other than the authority shall be authorized without the approval of the authority to expend state funds to purchase, lease, rent, charter, maintain, or repair state aircraft to be used in connection with state business or to employ a person whose official duties consist of piloting state aircraft.

(B) This paragraph shall not apply to the Department of Public Safety, the Department of Natural Resources, or the State Forestry Commission.

(d) The funds and assets of the authority, as well as the performance of the authority, its services, and equipment, shall be audited annually by the state auditor. The results of such audit shall be open to inspection at reasonable times by any person. A copy of the audit report

shall be sent to the state accounting officer. The authority shall also provide the Governor, the Speaker of the House, the President of the Senate, the chairperson of the House Committee on Public Safety and Homeland Security, the chairperson of the Senate Public Safety Committee, the chairperson of the Senate Veterans, Military and Homeland Security Committee, the chairperson of the House Committee on Transportation, and the chairperson of the Senate Transportation Committee with a copy of the state audit report which shall include a full report of the activities and services of the authority. The performance audit report shall be provided no later than December 31, 2013.

(e) On September 1, 2011, the six aviation mechanic positions that were previously transferred by the Department of Public Safety to the authority shall be returned to the Department of Public Safety along with the funds budgeted for such positions. (Code 1981, § 6-5-4, enacted by Ga. L. 2009, p. 848, § 1/SB 85; Ga. L. 2011, p. 409, § 2/HB 414; Ga. L. 2012, p. 1082, § 1/SB 339.)

The 2011 amendment, effective May 11, 2011, in subsection (a), inserted “, except those aviation assets of the Department of Public Safety” in the first sentence, rewrote the second sentence, which read: “All aircraft owned or operated as of July 1, 2009, or a later date determined by the Governor, by any other entity of state government shall be transferred on that date to the custody and control of the authority; provided, however, that this chapter shall have no application to aircraft owned or operated by the Department of Defense.”, inserted “, other than the Department of Public Safety,” in the third sentence, substituted “may remain in the employment” for “shall remain in the employment” in the fourth sentence, and added the provisos in the fourth and fifth sentences; in subsection (c), added

“when requested” at the end of the first sentence, and inserted “and the Department of Public Safety” in the last sentence; and added subsection (e).

The 2012 amendment, effective July 1, 2012, rewrote this Code section.

Cross references. — State aviation operations, § 35-2-140.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, “Code Section 12-6-22.1” was substituted for “Code Section 12-6-25” in subparagraph (a)(1)(B); a period was added at the end of subparagraph (a)(4)(A); a semicolon was substituted for a period at the end of division (a)(4)(B)(i) and subdivision (a)(5)(A)(ii)(I); and “; and” was substituted for a period at the end of division (a)(4)(B)(ii) and subdivision (a)(5)(A)(ii)(II).

OPINIONS OF THE ATTORNEY GENERAL

Primary purpose of the Georgia Aviation Authority (GAA) as mandated by the General Assembly is to operate and maintain the state’s aviation assets and “to provide aviation services and oversight of state aircraft and aviation operations.” Neither subsection (a) nor subsection (b) of O.C.G.A. § 6-5-4, which describes the

powers of the GAA, grants the GAA the authority to exercise general law enforcement powers. Although the GAA provides valuable assistance to various agencies with law enforcement responsibility, that does not make the authority a de facto law enforcement agency in and of itself. 2011 Op. Att’y Gen. No. 11-3.

6-5-5. Additional powers of the authority.

In addition to the powers specified in Code Section 6-5-4, the authority shall have the powers:

(1) To have a seal and alter the same at its pleasure;

(2) To acquire by purchase, lease, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character for its corporate purposes;

(3) To acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper real property or rights of easements therein or franchises necessary or convenient for its corporate purposes and to use the same so long as its corporate existence shall continue and to lease or make contracts with respect to the use of or disposal of the same in any manner it deems to the best advantage of the authority. No property shall be acquired under this chapter upon which any lien or other encumbrance exists unless at the time such property is so acquired a sufficient sum of money is deposited in trust to pay and redeem the fair value of the lien or encumbrance; and if the authority shall deem it expedient to construct any project on lands which are a part of the real estate holdings of the state, the Governor is authorized to execute for and on behalf of the state a lease of the lands to the authority for such parcel or parcels as shall be needed for a period not to exceed 50 years. If the authority shall deem it expedient to construct any project on any other lands the title to which shall then be in the state, the Governor is authorized to convey, for and in behalf of the state, title to such lands to the authority;

(4) To appoint and select officers, agents, and employees, including pilots, maintenance workers, engineering, architectural, aviation, and construction experts, fiscal agents, and attorneys, and fix their compensation and otherwise adopt policies that establish a system of sound personnel management;

(5) To make contracts and leases and to execute all instruments necessary or convenient, including contracts for construction of projects and leases of projects or contracts with respect to the use of projects which it causes to be erected or acquired; and any and all political subdivisions, departments, institutions, or agencies of the state are authorized to enter into contracts, leases, or agreements with the authority upon such terms and for such purposes as they deem advisable. Without limiting the generality of the above, authority is specifically granted to any department, board, commission, or agency of the state to enter into contracts and lease agreements for the use or concerning the use of any structure, building, or facilities

or a combination of any two or more structures, buildings, or facilities of the authority for a term not exceeding 50 years; and any department, board, commission, or agency of the state may obligate itself to pay an agreed sum for the use of the property so leased and also to obligate itself as part of the lease contract to pay the cost of maintaining, repairing, and operating the property leased from the authority;

(6) To accept loans or grants of money or materials or property of any kind from the United States or any agency or instrumentality thereof upon such terms and conditions as the United States or the agency or instrumentality may impose;

(7) To exercise any power usually possessed by private corporations performing similar functions, which is not in conflict with the Constitution and laws of this state; and

(8) To do all things necessary or convenient to carry out the powers expressly given in this chapter. (Code 1981, § 6-5-5, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-6. Moneys received deemed trust funds.

All moneys received pursuant to the authority of this chapter shall be deemed trust funds to be held and applied solely as provided in this chapter. (Code 1981, § 6-5-6, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-7. Public purpose of authority; responding to emergencies.

(a) It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purpose are in all respects for the benefit of the people of this state and are a public purpose and the authority will be performing an essential governmental function in the exercise of the power conferred upon it by this chapter.

(b) In order to ensure that addressing emergency law enforcement needs is the authority's first priority, the authority, in coordination with the Board of Public Safety, shall adopt policies and procedures to ensure that responding to emergencies, imminent threats to individual and public safety, natural disasters, or other emergency law enforcement needs is met. The authority shall be exempt from all sales and use tax on property purchased, leased, or used by the authority. (Code 1981, § 6-5-7, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-8. Jurisdiction for action.

Any action to protect or enforce any rights under this chapter shall be brought in the Superior Court of Fulton County. (Code 1981, § 6-5-8, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-9. Liberal construction.

This chapter, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof. (Code 1981, § 6-5-9, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-10. Termination.

Reserved. Repealed by Ga. L. 2011, p. 409, § 3/HB 414, effective May 11, 2011.

Editor's notes. — This Code section was based on Code 1981, § 6-5-10, enacted by Ga. L. 2009, p. 848, § 1/SB 85,



